

Internatinal Criminal Justice: Prevention as Peacebuilding

*The Impact of International Criminal Tribunals on Peace
building in Post-Atrocity Societies*

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Chapter I. Prevention of grave international crimes

I. The starting point: two general trends

From a global ethical and political perspective two broad international trends emerged after the end of the cold war: (1) The risk of interstate war is greatly reduced and the dominant pattern of armed conflict has been that of ferocious intrastate war. The end of the cold war brought renewed faith in and framework of action for international institutions and the concept of *post conflict peace building* has become a new paradigm supplementing traditional diplomacy, peace making and peace keeping operations. On the other hand, the trend of extremely violent conflict in the 90s caused widespread pessimism about the ability of the UN and other political organisations to prevent long standing conflicts from turning violent. The eagerness to undertake humanitarian intervention certainly cooled off after Somalia.

(2) After 1992 a main response chosen by the international community to the first trend –the new pattern of war - has in fact been a *legalistic* one, that is, the creation of international criminal tribunals (ICTs) during or in the aftermath of intrastate war. In the course of the 90s international humanitarian law was transformed from the traditionally ‘soft law’ of merely formally binding treaties and conventions into the ‘hard law’ of actual court room decisions. When finally applied to judge criminally culpable individuals international law, or justice (the term preferred here), was transformed into international *criminal* justice (ICJ) (Kalhoven 2003:2-3): On May 25, while the war in Bosnia were to rage for two more years, the UN Security Council (SC) adopted Resolution 827 whereby it established the *International Criminal Tribunal for the Former Yugoslavia* (ICTY). The UN failed, however, to make a military intervention and long abstained from any reactions save an arms embargo that proved fatal to Muslims of Bosnia (Malcolm 1996). The absence of action was even more striking in Rwanda when the international community did little or nothing to prevent the genocide from unfolding in early April 1994: most UN staff and Westerners were pulled out. The UN responded only after the atrocities had been brought to a halt by the Rwandan Patriotic Army (RPA). Later that year, by adopting

Resolution 955 the SC created a tribunal similar to that for Yugoslavia, the *International Criminal Tribunal for Rwanda* (ICTR).

As a result of these developments in 1998 the first permanent ICT in history, the *International Criminal Court* (ICC), was established. It came into effect on July 1 2002. However, ICJ is not only enforced by international tribunals: after the brief civil war in East Timor following Indonesia's withdrawal, the UNTAET set up special panels to prosecute the commission of international crimes in East Timor in 1999 (Mundis 2001:942-5). In 2002 the Special Court for Sierra Leone, also a hybrid between national and international elements, was established to prosecute the individuals most responsible for such crimes during the country's grotesque civil war (ibid:935-42). And in the same period more national courts, in Western countries, have tried individuals accused of grave international crimes such as genocide (Charney 2001:120).

II. The goals and tasks of international criminal justice

These two trends - the dramatic increase in the number of protracted conflicts turning into brutal intrastate wars and, as a response, historical progress in the development of ICJ - provide the empirical backdrop and starting point of this thesis. The analytical starting point is more concerned with the profound links between them and thus the case for ICTs. The main goal of the ICTs established in the 90s was not to punish those responsible for committing grave international crimes (*redress*). Neither was profound concern for the victims the head motivation of decision makers. Rather, the most commonly stated purpose of ICTs, including the ICC, is the *prevention* of future atrocities (Gallón 2001:93; Koskenniemi 2002:7). Furthermore, as ICC-Prosecutor, Mr. Moreno-Ocampo, declared in an interview, an ultimate end of the ICC is to "bring lasting, comprehensive peace" (MoveOnBulletin, 21.08.03).

Without defying the political intensions behind the establishment of ICTs, it is by far given what prevention or peace means or how they are attained. From a theoretical standpoint it is troubling that decision makers appear to have had only a

vague and, at best, purely normative idea of what they were doing. For although prevention based arguments have had a prominent status in legislative debates for decades, especially in Western European parliaments, they most often lack clear empirical support (Andenæs 1978, 1994). Therefore we must beg the question, what does the concept prevention imply? How can ICTs possibly prevent future atrocities? How can the enforcement of ICJ contribute to building “lasting peace? What is the link between these ends? First, prevention - peace will be analysed in the next chapter.

To begin with there is a distinction between *specific* and *general* prevention (Andenæs 1994:49-50; Akhavan 2001:12, quoting Andenæs 1966). Specific prevention refers to the idea that assigning individual criminal accountability prevents a particular (specific) individual from committing more crimes, primarily because the perpetrator is behind bars. General prevention, which is the sort we are concerned with here, is based on “relative crime theories” and the idea that crime punishment, such as imprisonment, is in need of further justification beyond the desire to punish the guilty (Andenæs 1994:15). The argument is consequentialistic, even utilitarian: criminal prosecution should and is capable of bringing about wider social effects and should benefit society in general. Namely, prosecuting and imprisoning individuals guilty of crime should prevent also other individuals from committing crimes.

In theory, general prevention is achieved through three mechanism (Andenæs 1978: 158, 1994:49): 1) it can work as *deterrence*: potential perpetrators are deterred from committing crimes by virtue of fear of being caught and punished; 2) law enforcement also maintains the function of *moral education* of citizens; it strengthens the moral code, mainly through the symbolic message conveyed by the act of punishing someone for something that society as a whole morally disapproves of; 3) finally, prevention is achieved through another long term effect: abiding the law becomes a *habit*, which usually prevents individuals from breaking it.

Regarding grave *international* crimes, such as the ones under the jurisdiction of the ICC (genocide, crimes against humanity or grave war crimes), prevention is believed to come through deterrence. Empirically speaking this is problematic. We must start with the fact that not even law enforcement in well ordered Western societies (in which the concept of prevention has originated) is capable of causing general prevention through deterrence. Not even states applying capital punishment manage to deter potential offenders from killing (Hood 2002: 230). A common interpretation of this fact is twofold: the form or severity of the punishment is not in itself a source of deterrence (Andenæs 1994:50-7), at least when it comes to the gravest of crimes. But, there are many examples of more successful prevention of lesser crimes so the main lesson from experiments in and debates over prevention - and this is essential to ICJ - is that prevention must at any rate be *crime specific*.

III Prevention and the context of international crimes

For prevention of international crimes to be ‘crime specific’ one must ask what characterises the international crimes under the jurisdictions of ICTs. In general - and this is the direct link between the two trends discussed above - these crimes are committed as a part of armed conflict. When journalists use the term *war crimes*, albeit misleadingly, to refer to the atrocities that the *ad hoc* tribunals are trying people for, they do so appropriately in one sense: international crimes are mostly committed during the chaotic state of war. Furthermore, as it turns out, such atrocities are even a *strategic* part of armed conflict, because they are deployed as means to achieve the ends that motivated aggressors resort to systematic violence in the first place. In Yugoslavia systematic “ethnic cleansing” was an implemented policy. And in Rwanda genocide was even the official policy of the Hutu Power party, CDR, and the grossly illegitimate regime under which genocide convict, Jean Kambanda, served as prime minister. Thus we must look more closely at the conflicts during which these international crimes were committed and of which they constitute an integral part.

Between 1990 and 2001 there were 57 “major armed conflicts in 45 locations” and all but three of these “were internal...” (Eriksson, Sollenberg & Wallensten

2002:232). Even though many of these were influenced by external actors in some degree, “All of the most deadly conflicts in 2001 - those that caused 100 or more deaths - were intra-state...” (Seybolt 2002:14). In addition it is worth noting that 11 of these conflicts had lasted “for 8 or more years” (ibid.). Becoming more complicated and harder to deal with as they evolve over years such conflicts are commonly labelled *protracted conflicts*. Furthermore they are characterised by being conflicts among groups that “live in close geographic proximity” (Lederach 1997:23). They are also “characterised by deep rooted, intense animosity; fear; and severe stereotyping” (ibid). These conflicts are group conflicts but the dividing unit of group identity varies: “[t]hat unit may be clan, ethnicity, religion or geographic/regional affiliation, or a mix of these” (ibid:13). Typical conflicts in case are Somalia, Rwanda, East Timor, Azerbaijan, Colombia, Haiti, Sudan, Sierra Leone, Uganda and former Yugoslavia.

So, what is the role of ICTs in contexts like these? At any rate, it must be clear that although ICTs may be established when war is still raging, ICJ really enters the stage only in the aftermath of war (Akhavan 2001). This is not to say in the aftermath of conflict because protracted conflicts are rarely “resolved” by war. This also means that contrary to intentions of several decision makers and legal scholars ICTs are not able to cause what Gustavo Gallón labels “cessation of ongoing violations” (Gallón 2001:94). Armed conflict is never stopped by judicial means but through political or/and military action. The main goal of ICTs must thus be the prevention of renewed atrocities and future violations after peace, or at least cease fire, has been settled.

IV. Defining the main research questions

However, prevention of grave international crimes does not come through either of the mechanisms listed for national criminal justice. The main reason is simply that both the context and the causes of international crimes differ widely from that of crimes committed in fairly well ordered, democratic societies. As we have just seen, the context is that of war and societies wrecked by violent, protracted conflict. Heinous atrocities are committed as an intentional part of these conflicts. Therefore

they do not occur suddenly but can often be predicted, at least to a certain extent. The main reason that is that human rights violations amounting to grave international crimes are a result of political goals articulated in advance, that is, before war broke out. The desire to attain these goals provides the head motivation for resorting to systematic violence that is, inciting, provoking or igniting war.

In essence then, the foregoing means that the conflicts we are studying are basically political in nature, and the some of the main causes to why they turn violent are political. No doubt, these conflicts have deep socio-economical roots and evolve around ethnic identities. The point is that making these roots salient and the focal point of mass mobilisation, a main function of ethno-nationalism, is by and large a political process. If true, this means that the main causes explaining the occurrence of grave international crimes are *political*.

This has implications for ICTs and the prevention of future atrocities: ICTs have a political not only a legal role to play. Because, in order of addressing the causes of atrocity they must address the causes of armed conflict too. Hence, they must be able to make a political impact on the post war societies in which the crimes under their jurisdiction were committed. The only way positively to make such an impact is, in concert with a number of actors, to engage in peace building efforts in the particular post war /atrocity (this term will be discussed in next chapter) societies in question.

In conclusion, we may hypothesise that ICTs' prevention of renewed violence and future atrocities in the context of protracted conflicts is only achieved by means of *peace building*. ICJ, however, is only one out of several dimensions of peace building and ICTs only one type of actor. More specifically, then, the main research question in this thesis is: *how can international criminal tribunals contribute to the processes of building sustainable peace in post war (/atrocity) societies?* This is an empirical question that will have to be articulated more specifically. Narrowing our focus, we must ask *how have the ICTY and the ICTR contributed to building sustainable peace in the republics of former Yugoslavia and Rwanda?*

In addition to this explicitly empirical focus this thesis is founded on a theoretical motivation. The deeper purpose of empirically examining the impact of the *ad hoc* tribunals is to enable us to say something more general about the merits and limits of ICJ and the future challenges of the ICC. Therefore the lessons learned by the *ad hoc* tribunals must be analysed and in a systematic manner enabling us to elaborating more generally on ICJ. On basis of such analyses we also ask, *what are the lessons for ICJ in general and for the ICC in particular?*

V. The structure of this thesis

Chapter II provides an overview and a discussion of relevant theory. Peace theory is examined and eventually linked to theories of ICJ in order of sketching a theoretical framework for answering the main research questions. Key concepts such as peace, justice and peace building are defined. A few methodological points are also made here. **Chapter III** contains some brief methodological considerations. **Chapter IV** is an analysis of the ICC and the historical backdrop of its establishment. Asking for the merits and limits of the ICC we must first look into the formal, judicial aspects of the court which are to be found in the *Rome Statute of the ICC*. **Chapter V** goes on and analyses the impact of the ICTY in Croatia, B&H and Serbia. Similarly, **Chapter VI** examines what impact the ICTR has had in Rwanda. In both these empirical chapters the history and nature of the conflicts is discussed. The cases in these chapters are chosen mainly because they exhaust the universe of possible cases.

Chapter VII, is a systematic discussion of the ‘lessons’ of the work of both *ad hoc* tribunals. These lessons are summarised in nine analytical points. Finally, the **Epilogue** assesses these lessons in a comment on the challenges that the ICC faces in one of its first cases, Uganda. The aim of this last “chapter” is to briefly spell out the challenges for ICTs in *general* by analysing the *particular* challenges that the ICC - the only permanent ICT and main instrument of ICJ - has to deal with in its first cases. In other words, the *second* research question is addressed here.

Chapter II: Relevant theory: justice and peace

I. The quest for theoretical foundations

In order of answering the main general research question stated in the previous chapter, *how can international criminal tribunals contribute to the processes of building sustainable peace in post war (/ atrocity) societies?*, we must clarify what we mean by ICJ, peace and peace building and how we believe ICTs can contribute to peace building. This chapter is a quest for theoretical foundations for and understanding of the key concepts subject to empirical inquiry in the following chapters. The relevant literature consists of several partly isolated disciplines and fields of research, in main - international relations theory (IR), theories of transitional justice and regime change (TJ) and peace research.

First, IR theory provides important analysis of the political backdrop of the establishment and work of ICTs. A major problem with IR, at least from the perspective sought carved out in this thesis, is that it almost exclusively treats ICTs as dependent variables (Abbott 1999:363). Assessing IR theory for our purposes we should pay heed to Abbott's advice: "Alternatively, IR might analyze legal rules and institutions - including the processes of legal decision making - as explanatory factors ("independent variables")" (ibid.) Moreover, Abbott suggests that "One might ask, *has the existence of the International Criminal Tribunal for the Former Yugoslavia (ICTY), or the way it has handled cases, affected the behaviour of governments and other actors in the Balkans? If so, by what means?*" (ibid.) This is almost precisely what this thesis aims at doing in this and the following chapters.

Theories of TJ also tend to treat ICTs either as phenomena to be explained or as merely one out of several explanatory factors, or both - given that comparative analysis vary the roles and statuses of variables in the course of analysis. Andreassen

& Skaar (1998:18-21) provide a case in point. They offer a comparative regime change perspective: the main dependent variable is, as it usually is elsewhere in TJ theory, “consolidation of the democratic regime”. They analyse four broad independent variables, *peace*, *truth*, *justice* and *reconciliation*, in order to explain success or failure on the dependent variable. In this approach peace is treated as merely one of several preconditions to the consolidation of democracy, albeit indirectly by being a “precondition of reconciliation” which in turn is a major precondition to democratic consolidation in previously authoritarian regimes (ibid:21). In this approach peace is reduced to cease fire: violence is absent but this perspective does not manage to say anything about whether or not armed conflict might resume because the foundations of an enduring state of peace are partly neglected. The concept of peace building is partly missing in this perspective.

In order of understanding peace as a ‘sustainable peace’ we must reverse the perspective and fix ‘peace’ as the main dependent variable. In such a perspective, democracy would in turn figure as a long term condition for developing - *building* - a *sustainable* peace. That kind of approach holds justice and reconciliation - facilitated by cease fire and security, precipitated by truth and presupposed by a range of other factors - as preconditions of a sustainable peace and consequently the main explanatory factors in the analysis. This is the perspective sought developed here – that is, despite the fact that consolidation of democracy and achieving inter-ethnic reconciliation in post war societies is not included in the main analytical focus of this thesis; why reconciliation is not included will be explained later in the chapter.

Our main concern is *justice*. Justice is here understood as international criminal justice (ICJ) which in turn refers strictly to the enforcement of international criminal law (ICL). ICL refers to the international humanitarian treaties and conventions applied by criminal courts prosecuting individuals for the commission of international crimes. ICL can be enforced both by international criminal tribunals and courts as well as national courts and ‘hybrid courts’ (Dickinson 2003). Of course we are interested in national criminal justice but only when part of ICJ, for instance by

acting on the precedence set by ICTs, or when defying ICTs. Here, our main interest is the activities of specific ICTs: the ICTY, the ICTR and the ICC. So in this thesis ICJ will refer only to the activities of these tribunals and our main research question is how these ICTs contribute to building sustainable peace in societies having experienced protracted conflict, war and mass atrocities. This task requires some discussion of peace theory. The aim of the following discussions is an exploration and eventually an explication of the links between peace and ICJ. The theoretical concepts discussed below will help us structure the empirical analysis.

II. Peace building

The concept *peace building*, as a multidimensional political project involving a plethora of various tasks and actors, definitely entered international institutional vocabulary with the report *Agenda for Peace* presented by UN G-S Boutros Boutros-Ghali in 1992. *Peace building* was defined as a set of tasks and goals facing UN bodies operating in *post war* societies – differing, thus, from *peace making* and *peace keeping*, that is, brokering peace accords and ensuring that the parties respect them. The objectives of peace building were that of broad societal reconstruction, conducted in a way that allegedly prevented “recurrence of conflict”- not through military means but through “developing structures that would “consolidate peace“, and by addressing “underlying economic, social, cultural and humanitarian problems”. In *Supplement to An Agenda for Peace* (1995) peace building was defined as to aim at “the creation of structures for the institutionalization of peace”.

Theoretically, the concept had been invented and defined in the late 60s by Johan Galtung who drew a distinction between *negative* and *positive peace*. The former roughly equates the objects of peace making and peace keeping, but the latter refers to a kind of “self-sustaining peace“(Cousens 2001:11), where the conflict is not merely avoided but transformed and in effect rendered obsolete. The historical roots of this peace concept can be traced to Immanuel Kant and the essay *To Perpetual Peace: A Philosophical Sketch* (1795): “No treaty of peace that tacitly reserves issues for a future war shall be held valid [...] For if this were the case, it would be a mere

truce, a suspension of hostilities, not *peace*, which means the end of all hostilities [...] A peace treaty nullifies all existing causes of war..." (Kant [1795/]1983:107)

Kant's ideas are important in several respects and may well serve as a starting point for elaborating on some central points in peace research.

II.I The concept of peace

In Kant's essay the concept 'peace' is reserved for a specific state of affairs produced in and by a post war society which eventually possesses the institutional means and resources to manage severe conflicts by non violent means. This is a carefully forged societal state that endures because the post war society itself manages to handle its protracted conflict without the aid of international society. The means are in other words embedded in the post war society itself. The specific aims and means involved in a peace building process vary from case to case as peace building must always be highly *context sensitive* long term goals (Lederach 1997; Mani 2003; Paris 2004) in order to acknowledge the problems and challenges particular to the context at hand. This is also a lesson from a wide range of cases: peace building as "[r]econstruction is most likely to succeed when all key local constituencies have agreed on how to share power [...] and what role the international community should play in the effort..." (Ahmed 2005:169)

A strong spokesman of such a view is Lederach (1997:20-30) who emphasises that the capacity to manage conflict internal to society is established through socio-cultural reconciliation, which restores mutual social trust among the citizens. Peace, then, is a *relational* phenomenon and the main aim of peace building is to *transform shattered relationships*. This is a political task that demands a bottom-up strategy heavily involving mid level leaders capable of including the grass root level of society.

II.II Further condition of sustainable peace

This kind of sustainable peace is consolidated in time because the way it was forged and successfully managed to address the underlying causes of conflict. As pointed out, the specific measures of peace building efforts vary according to the nature of the conflict at hand, that is, what has caused it, how it has evolved and been handled, and how the war ended. Some characteristics seem more or less universal though. Walter (2002:160) has for instance (in a strategy that combines statistical methods and case studies) demonstrated that the success of peace keeping and peace building depends not only on the will of the conflicting parties: “Combatants decide to pursue peace settlements in part because a third party is willing to verify or enforce demobilization, and because their role in the first post war government can be safeguarded”. Similarly, Doyle & Sambanis (2000:779) define peace building as “an attempt, after peace has been negotiated or imposed, to address the sources of current hostility and build local capacities for conflict resolution”. In a broad statistical analysis they demonstrate that the success of such operations is a function of local capacities, the persistence (time line, coordination and financial strength) of international assistance and the depth of the recently ended war. In the long run, though, peace building is related to types of regime and must always mean “democratic peace building”.

II.III The politics of establishing peace

Kant also believed that “The state of peace among men living in close proximity is not the natural state...” (Kant 1983:111) Hence, “The state of peace must therefore be *established*, for the suspension of hostilities does not provide the security of peace...”(ibid.). Peace is never sustainable from the start, there are no strict guarantees of success. In fact, most peace accords in “protracted armed conflicts” are violated (Smith 2004:4) and “about 50 percent of all peace agreements to end civil wars collapse within five years...” (Smith 2003:18.) To a large extent, this is the problem of “spoilers” in peace processes (Stedman 1997:8-12): due to various reasons, some groups do not accept or respect truces and peace accords and accordingly they tend to act in breach of them, setting the stage for the resumption of the negative spiral of violence.

Moreover, serious peace building must take into account that there appear to be four main reasons for the resumption of war (Smith 2004:4-5): (1) insincerity by at least one of the parties; (2) disappointment on the part of at least one of the parties; (3) “internal disagreement or even fragmentation” with at least one of the parties; (4) and “that the underlying causes of armed conflict remain”. Among other things, this means that post war peace building also must be *preventive* because it aims at preventing the resumption of armed conflict (Doyle & Sambanis 2000:779). A post war context might prove to be a pre war situation (Smith 2003:20).

Against this backdrop, the main task of peace building is to try to *establish* and facilitate the emergence of viable mechanisms for peaceful management of conflicts in a given society. Protracted conflicts are seldom settled, and a final resolution is rarely achieved. Such conflicts are merely *managed*, that is, handled in a way that dampens them and prevents them from escalating and turning violent. Peace building efforts with such ambitions must be designed specifically to address the causes of war and its resumption. This task involves both national and international actors and both official state bodies and NGOs, the former becoming more active as they get empowered in the course of peace building. The main long term goal of peace building is transforming a cease fire and sheer absence of violence into a lasting societal state. In essence, that must include transforming social relations.

In the end, peace building is a *political* concept. It recognises the hard earned lesson that the main causes of war are *political*, and that the challenges of preventing conflict of turning into war and preventing the resumption of group violence must thus be a political task. This is apparent in both of the two cases analysed in this thesis, the countries of the former Yugoslavia, and Rwanda.

III. Peace and justice

Returning to our main research question we must ask how ICJ contributes to building a sustainable, self-enforcing peace. That is to ask for the link between peace and justice. Mani (2003) suggests that *justice* is needed to enhance what she, following

the tradition from Galtung, calls ‘positive peace’. This tradition emphasises justice as a multidimensional concept, including socio-economic and “cultural” justice. In Mani’s approach each dimension of justice corresponds to an “area of positive peace building” (Mani 2003:17). The problem is that the terms justice and positive peace denote the same thing. What is often labelled ‘positive peace’ is in theory achieved if social, economic and cultural ‘violence’ is eliminated, which means nothing more than socially, economically and culturally defined justice being brought about. So, where there is justice, there is positive peace - and visa versa. In Mani’s approach every aspect of society is included in justice of some sort and the concept becomes confusing and too vast: in the Galtung tradition positive peace is absent in case of, for example, financial policies that in some way discriminate one or more groups in society. In that sense, there has never been peace in the human world. The concept of ‘positive peace’ should be abandoned for more precise terms and more precise understanding of justice.

In stead, I propose that the term peace be reserved to denote a more or less specific kind societal, political state which in time proves to be sustainable, that is, self sustainable. If it does not, it was a mere ceasefire (to paraphrase Kant). It is not given what factors will provide a sustainable peace in each case, but however defined peace must in some sense consist in altered relationships. This is the essence of the perspective offered by Lederach (1997) and as a general lesson it is adopted here. How social relations must be altered depends on specific context at hand. By understanding peace in this formal way, we can avoid confusing a specific social-political phenomenon with the various factors precipitating it: in other words, peace is not entirely the same thing as the manner in which it is achieved. Likewise, justice is not the same as peace and all cases considered it does not always enhance sustainable peace. Peace is a multidimensional object and requires that different tasks are being attained simultaneously and enforcing ICJ is merely one out of several important tasks in a peace building process. However, criminal justice is without doubt one general, important precondition to peace. Reiterating our aim here, this thesis explores, theoretically and empirically, how ICJ contributes to peace.

Not everything in a post war period is a part of the political processes of peace building (Cousins 2001) and peace is not entirely the same as the conditions enhancing it. Thus a defining line must be struck between strictly political ends and actors and social and economic actors on one hand, and strictly legal institutions - set up through political processes, though - on the other. However, this does not mean that ICTs do not produce political effects. On the contrary, as was noted above, peace building is a *political* venture and this means that *in the context of post war peace building, ICTs have to make a political impact*. Really, this means nothing more than differentiating between institutions and their effects in order of analysing them adequately. This approach has a methodological benefit: this way we get to define ICTs as independent variables and their actual effects upon a peace building in given post war society as the dependent variable in the empirical analysis. We are concerned here with *how ICTs contribute to building peace in societies torn by enduring, protracted conflicts*.

Before considering more specifically how ICTs can contribute to peace building we must clarify a common misunderstanding stated in parts of the peace research literature: it is often believed that peace building efforts aim, essentially, at *restoring, rebuilding* or *reconstructing* various structures in a post war society, such as representative political bodies, the legal system and socio-economic institutions. In most cases, however, restoration would strictly speaking imply to reinstate and restore an autocratic regime, rebuild corrupt and dysfunctional official institutions, and reconstruct a politicised legal apparatus and repressive social structures. Needless to say, this is the opposite of what peace building must aim at - given that its main end is enhancing a sustainable peace. The former structures were in most cases a crucial part of the problem and causes of the conflict and even its escalation into war.

We must also be aware of the term *post conflict* society which is equally misleading: in most cases, by the time of signing a peace accord the conflict is not resolved and that is why further peace building is needed. Neither case examined here represents a post conflict society: Bosnia after Dayton was and is a *post war* society.

To characterise Rwanda since the 1994 as a post war society, would be misleading, as will be demonstrated in chapter V. In stead of post conflict or post war society I propose we use the term *post atrocity societies* when referring to Rwanda and the former Yugoslav countries, to denominate the fact that conflict lingers on and that a given society is primarily characterised by having experienced mass human rights violations. This point illustrates the general importance of (international) criminal justice in peace building: The articulation and political mobilisation of grievances over past abuses often provides common group motivations in the deepening and escalation of conflicts and their path to mass violence (Smith 2004:13). Criminal justice is needed to rectify that sense of injustice. And when that injustice is a part of protracted conflict between groups, it is best served by an impartial third party, with the adequate capacity, an international criminal tribunal.

IV. The merits and limits of international criminal justice

Our focus is still on defining how ICTs can contribute to the “political processes and institutions that can manage group conflict without violence but with authority and, eventually, legitimacy” (Cousens 2001:12). Justice being a central dimension of conflict and a thus a vital part of the attempts to solve, manage and transform violent conflicts, ICTs play an important role in the “international efforts to help a given society build its political [and legal!] capacity to manage conflict without violence” (ibid). This is the main general aim of post atrocity peace building. The question is then, how do ICTs, more specifically, contribute to achieving the ends deduced from this main general goal of peace building? How can ICTs contribute to managing, altering or undermining the impact of the main causes of (armed) conflict?

The debate on the actual peace building effects of ICTs in post war contexts and how plausibly to interpret them tends to run into a forest of arguments with a bifurcated network of pathways, roughly divided between liberals and realists. The latter view first: Realists typically warn of the “nationalist backlashes” presumably produced by international tribunals’ eager thrust for criminal justice being served

(Bass 2001: 205). As it turns out, though, both sides in the debate show some merit when viewed in the light of empirical findings.

There is massive empirical support of the backlash argument, especially regarding political development in Serbia and Republica Srpska immediately after the end the war in late 1995 and the first elections in the new B&H in 1996 but also almost ten years after in 2004. Realists accurately predicted that the hastily scheduled elections in Bosnia in 1996 would strongly favoured nationalist political forces (Cousins 2001). Although he obviously does not represent the Hague and therefore this is not an example of international criminal justice (sic!), Paddy Asdown's decisions in June 2004 to remove tens of political and bureaucratic figures in Republica Srpska also represents a hard line choice that tipped balance of public opinion in favour of nationalist politicians. This result was hardly surprising. A major lesson of past ten years of peace building is that premature liberalisation and arrangement of elections can do more harm than good (Paris 2004). Recent literature thus emphasises "the importance of properly sequencing state building, *starting* by strengthening the institutions of security and law and order, the army [...], the police, and the judiciary." (Ahmed 2004:164).

The argument of the liberal stance is the one examined and partly adopted in this thesis. According to Bass (2001:206-7), "[l]iberals argue that war crimes tribunals build up a study peace by, first, purging threatening enemy leaders; second, deterring war criminals; third, rehabilitating former enemy countries; fourth, placing the blame for atrocities on individuals rather than on whole ethnic groups; and, fifth, establishing the truth about wartime atrocities." These five points will be used to structure the discussion of how ICTs contribute to peace building. And, in a corrected and amended version, these analytical points provide the theoretical framework for structuring the empirical analysis.

IV.I Purging threatening leaders – addressing the role of the elites

The main causes of protracted conflicts that turn violent are political. Ethnicity obviously plays a vital role in the development and escalation of conflict, as Yugoslavia and Rwanda, but it is not *per se* a cause of conflict. In order of serving as bases for group mobilisation ethnicity and other collective characteristics must be made salient in some way, that is, *politicised*. This is the reason for political elites representing such a crucial part of the problem. Elites articulate group identity, they invent and advocate the salient ideology and, consequently, the political agenda of a given community, and they instigate and conduct the political mobilisation needed in order of implementing that agenda. In sum, elites are largely responsible for the escalation of conflict and often the outbreak of war (Akhavan 2001:7). So, in order of addressing major causes of conflict, ICTs should by means of ICJ purge the political elites responsible for rendering possible the committing of international crimes and even ordering them. Holding accountable key persons from the aggressor elite, and actually prosecuting them in court, undermines their political influence (ibid.). This effect is preventive in the sense that it removes what was a prominent cause of the armed conflict and what might be a central source of its future resumption. Leaders feeling that their position is being threatened by political changes and the prospect of a viable peace deal are often interested in stalling peace building efforts. Key persons of the old political, criminal elite thus turn into ‘spoilers’ of the peace process and must be treated accordingly.

IV.II Deterrence.

Of all the proposed and desired effects of ICTs deterrence is the most controversial and unlikely one. To believe that the work of ICTs could possibly deter political leaders or soldiers in an ongoing war from committing grave atrocities is at best naive (Akhavan 2001:9). At worst, it can induce lethal consequences: if such a belief dictates the policies of international actors facing a civil war or a genocide in a given society, it could certainly reduce their actions to that of legalism, i.e. establishing an international tribunal and hoping it might prevent any further violence. But this stance is something of an illusion. Relevant empirical analysis, including this thesis,

show that ICTs have never stopped a war or stalled the gravest of crimes; what happened in Srebrenica in the summer of 1995 is the utmost proof of that observation. This is the clearest limit of legalism. In part it rests on two flawed assumptions about the parties in an armed conflict: (1) Deterrence presupposes rational choice, of some sort, which seems if not impossible then at least rare in a situation as chaotic as a war (Fetherston 2000:195-6) and highly unlikely with [i]ndividuals who commit atrocities on scale of genocide...” (Minow 1998:50). This is a large part of the very problem with protracted conflict and war: choices and actions are often guided by factors minimising rationality of individuals *and* of groups, such as grievances and coercion. In addition, the formidable problem represented by the lack of reliable information and propaganda renders ‘rational choice’ almost impossible in a war situation.

(2) More important, though: those who commit international crimes do so with the firm belief that their cause is just, and/or that they at least will not be punished for it. They have joined and are fighting a war they believe they are winning. Moreover, “[i]f the acts do not evident criminal intent, and instead come about as aspects of ideological programmes that strive for the good life [...] or to save the world from a present danger, then the deterrence argument seems beside the point” (Koskenniemi 2002:8). Secondly, the actors’ core interests may be at stake. In this respect, both sides in the conflict can represent a problem: “The key bargain in qualitatively asymmetric conflicts [...] is between governments asked to surrender their claim to a permanent monopoly of political power [...] and opposition groups asked to give up the threat of use of violence” (Ramsbotham 2000:174), often their only leverage.

The main obstacle to the ICTY in its first years of work, was that the old, authoritarian regimes responsible for the wars and the horrors of war, were still intact. Authoritarian regimes always count on their survival. And regimes that act on such beliefs are not frightened of getting punished by ICTs who even lack their own police force. Prevention of future crimes does not come about through deterrence, as was pointed out in chapter I, and this is the main reason that ICTs, in order of being able

to somehow prevent international crimes, must view themselves as a direct part of peace building. By contributing to peace building, they can help prevent the resumption of armed conflict which otherwise might have provided the circumstance of further atrocities.

IV.III Rehabilitation.

This effect regards the reconstruction part of peace building. As pointed out earlier, speaking of reconstruction is often misleading. Nevertheless, ICTs can play an important role in this part of the long term peace building processes: a main function of enforcing ICJ is to contribute to establishing rule of law. The rule of law and a culture of respect for legal routes to justice and conflict resolution is only enhanced if the prevailing culture of impunity is eradicated. ICTs can set legal precedents for the new judiciary in the society in case, facilitating the strengthening of society's own institutional mechanisms for conflict management. Tackling the culture impunity, upheld by the political now criminal elites, found under autocratic regimes and in the shadows of war is also a way of addressing the causes of (armed) conflict: by removing the source of widespread feelings of injustice on part of at least (the individuals of) one of the parties involved in the conflict group grievances as a cause of conflict is undermined. Setting legal precedence also means setting standards of criminal justice and providing concrete guidelines to national courts on how to rule in cases of grave international crimes.

IV.IV Individual accountability , not collective guilt.

Adequately addressing the causes of war also means undermining the destructive, essentialist notions of collective characteristics forged to mobilise a community for a single political cause, dictated by a corrupt clique. Such notions provide crucial motivations in the development and escalation of protracted conflicts and must thus be undermined in order of "transforming relationships", and providing new motivational grounds that favour the ends of peace building. This fundamental fact cannot be overstated: communities are not responsible for this or that. Only

individuals are moral beings capable of choice and action; “the group has no hands”, as Søren Kierkegaard put it. Only individuals can meaningfully be ascribed moral and legal culpability and this fundamental feature must be communicated to conflicting parties.¹

IV.V Establishing impartial truth.

This function and task of ICTs relates directly to the goal of assigning individual criminal accountability. During the Nuremberg trials and during the first case before the ICTY, the Tadic case, it came clear that an integral function and task of ICTs is to establish a factual record of the history of the conflict and its evolving into war. In order of demonstrating that the crimes in case were committed, the prosecution had to give an authoritative account of the context of the crimes, before evidencing that the accused was involved in this criminal enterprise. Such impartially established and presumably unbiased records of the facts about the conflict, is a precondition to reconciling with it. And assumingly, publicly debating a truth that has not been established by either of the conflicting parties is a precondition to getting rid of the collective stereotypes and historical myths that lie at the core of the conflict.

The ambition and the belief has repeatedly been stated by various actors - politicians, judges and scholars alike - that ICTs should and actually do contribute to societal *reconciliation*, and that this underlines their importance to peace building. However, the empirical material analysed in the present thesis reveals less optimism in this respect: it seems that the ICTY and the ICTR have not brought about any systematic reconciliation in Bosnia and Rwanda. The reason for this may of course be that the effects of the tribunals’ work are blocked by a number of factors, ranging from the media situation, infrastructure, popular believes and domestic political

¹ This is the premise of methodological (Elster 1989:13) or normative individualism. However, there exist several theories operating with multiple and qualitatively different, also collective, notions of guilt - for instance that of Karl Jaspers, heavily criticised for confusing guilt with responsibility (Destexe 1995:62-3; Baumann 2002:207).

hostility towards international actors. However, it appears almost naive to believe that ICTs do contribute to reconciliation in the sense of “transforming relationships”. The main reason is that although they provide important preconditions to reconciliatory efforts, reconciliation is a bottom up process that must be domestically initiated and lead, and it requires broad popular participation. ICTs cannot wield this, especially when situated outside the society which problems they are addressing. At best they can facilitate reconciliation but for such a process to be brought about in a society torn apart by years or even decades of war popular forums, such as truth commissions of some kind, are required (Stahn 2001:954). Thus trials before ICTs *are not able* to cause forgiveness and reconciliation, because “[t]he trial itself steers clear of forgiveness”, and “[r]econciliation is not a goal of criminal trials except in the most abstract sense.” Minow (1998:26). For these reasons reconciliation is *not* a research issue of this thesis.

V. Conclusions: ‘stay the hand of vengeance’

In conclusion, as a sixth main point Bass (2000:304) contends that the most beneficial effect of the work of ICTs is that they “stay the hand of vengeance”: “In fact, the more likely alternative to international tribunals is vengeance - often in an untamed form that would be more destabilizing than international trials.” This appears to be the main merit of the IMT, the ICTY and the ICTR: the absence of these institutions is a scenario much worse than the situation which they, in concert with a range of other international actors, are currently creating. Although this argument is counter-factual, and thus controversial to some, its validity is quite openly leaning on a well established observation in the field of international organisation: a common criterion for evaluating the effectiveness and the efficiency of international institutions is by asking how things would most likely have been did they not exist (Levy, Young & Zürner 1995:). As it seems, international institutions do matter.

A similar lesson is underlined by Minow (1998:26) who concludes that any international trial “in the aftermath of mass atrocities [...] should mark an effort

between vengeance and forgiveness. It transfers the individual's desires for revenge to the state or official bodies [and] cools vengeance into retribution..." That way they can help prevent atrocities triggered by emotional grievances. This is prevention, not by means of deterrence but peace building. And this way ICTs wield themselves able to address even the 'root causes' of war as many conflicts tend to get politicised and violent exactly on the basis of articulation of group grievances over unjust events in the past.

In conclusion we may hypothesise that the effect discussed in this section appears to be the single most important peace building effect of the work of ICTs. But the potential effects of the currently operating ICTY and the ICTR, must be made subject to empirical analysis, which is the theme of chapter V and VI. The empirical analysis will be structured by deployment of the modified, improved versions of Bass six points discussed above. This framework is further specified in the next chapter.

Chapter III: Considerations on methodology

I.A mixed research design

Due to too little research, empirical as well as theoretical, on our subject it is no straight forward matter to determine *how* ICTs work, what their actual limits and merits are, and *why* it is so. Besides partly *explaining* this, this thesis aims at *exploring* how ICTs impact post war peace building processes. The design is both explorative and explanatory. It is also *diagnostic* because it identifies some problems in this field (Andersen 1990:115). Furthermore, the design entails some traits of *interventionist* inquiry (see *ibid.*) in that some remedies to overcome the identified problems are commented: the last chapter contains some advices for the ICC, lessons made by the *ad hoc* tribunals, which the ICC must take into consideration in its work. This aim is accordance with peace research's aspiration of being an "applied" social science.

Notwithstanding the absence of strict explanatory intensions, the analysis obviously relies on assumptions about causal relations. We shall assume that ICTs do contribute to peace building and in that we shall also assume that there is a *causal relation* at work here. The foremost challenge in measuring causal effects is the problem of control (Hellevik 1988:27-9). What we take to be a causal effect may be spurious and therefore one must be able to control for the effects that various variables have on the main dependent variable, variations in which is the explanandum. In other words, the effects we assume to be caused by the *ad hoc* tribunals may be the influence of other factors.

Being aware of this chapter II underlined that peace building is a process involving a number of different actors: it is an obvious matter that the long term goal of building a sustainable peace in post atrocity societies is achieved by a range of different means deployed by a number of actors. For instance, the main direct cause of the absence of ethnically motivated group violence in Bosnia the past 8-9 years is

the heavy international military presence (Cousins 2001). So it is not to be denied that our object of study, the impact of the ICTY (and the ICTR), may be the effect of other variables. However, given that the intension of this thesis is not strict causal explanation of why peace building processes fail or succeed, or why ICTs fail or succeed, suffice it to say that this analysis is aware of these problems. It will be assumed that the material analysed in the empirically focused chapters depicts what are not spurious effects but most likely causal effects of the *ad hoc* tribunals. But it is also assumed that ICTs have mainly *indirect* effects on the main dependent empirical variable - *building of sustainable peace in Rwanda and former Yugoslavia*. These effects are achieved through the six *mechanism* discussed in chapter II (section IV), further articulated in section III below.

II. Lessons of history

As stated in chapter I the purpose of the empirical analysis of the peace building effects of the ICTY and the ICTR is to carve out some important lessons for ICTs in general and the ICC in particular. However, as George (1979:43) points out, the “lessons of history” become intelligible and useful only when converted “into comprehensive theory that encompasses the complexity of the phenomenon or activity in question”. Empirical analysis is blind without theoretical assessments. “[t]he task of theory is”, adds George, “to identify the many conditions and variables that affects historical outcomes” and by so doing theory “clarifies the apparent inconsistencies and contradictions among the “lessons” of different cases” (ibid:44). Following George, in chapter VII the experiences of the ICTY and the ICTR are matched and summed up in nine interrelated *lessons*. These nine points represent an amendment and improvement of Bass’ theory which was based on six indicators of how ICTs “can help build” what chapter II discussed and defined as a *sustainable* peace. The aim of chapter VII, therefore, is further development of the theory of ICTs and their scope. In the Epilogue these lessons are very briefly “applied” to comment another case, namely that of ICC’s potential impact on peace building in Uganda.

There is an additional theoretical lesson here: deterrence has, as chapter I contended, has enjoyed a status of an ultimate effect of ICTs and it has been widely believed that the ultimate goal, prevention, is achieved through the legal-psychological force of deterrence. Deterrence is also an important point in Bass' theory. However, as both chapters I and II and the empirically focused chapter strongly suggest, this is a false prediction and so the theoretical belief in and political reliance on deterrence must be *falsified* as far as it constitutes a theory, and as far as this theory has been tested against an alternative theory supported by facts that "are even forbidden"(Lakatos 1970:116, quoted in Hovi & Rasch 1996:31) by the theory on prevention as deterrence. Chapter II suggested that the theory on deterrence be abandoned and not listed as a strict goal of ICTs. This is not to say that ICTs cannot produce some deterrence, rather it means that in case of deterrence such an effect is not primarily being caused by an ICT but by factors such as threat of military defeat and the fear of being captured by armed forces. By cooperating with a number of actors ICTs may be able to cause indirect deterrence, because ICTs provide the intentional pretext of apprehending suspects of international crimes. Thus the theoretically more viable alternative to deterrence, outlined in this thesis, is a general assumption that ICTs contribute to prevention of international crimes in post atrocity societies, not by deterrence but by contributing to the long term, multi-level and multi-actor process of building sustainable peace.

III Validity

Linking theoretical concepts and empirical observations is the core challenge of maintaining validity. Adcock & Collier (2001:529) define what they call "measurement validity" as offering a systematic answer to the basic question, "*Do the observations meaningfully capture the ideas contained in the concepts?*" Enhancing validity, they suggest, is moving adequately from background concepts, to systematised concepts, and through indicators to scores for cases, and back again. In other words we must operationalise theoretical concepts by means of specified indicators, make empirical observations on the basis of these specifications and in the

end interpreting them theoretically. An operationalisation of the main theoretical concepts that structure the empirical analysis is required. Based on Bass' (2000) theory, chapter II suggested six main *mechanisms* (following Elster's definition, see Elster 1989:5,10) of how ICTs might contribute to building sustainable peace in post atrocity societies: (1) purging threatening leaders, (2) deterring war criminals, (3) rehabilitating aggressor societies, (4) assigning individual rather than collective guilt, (5) establishing truth and (6) staying the hand vengeance. More specifically, then, the empirical analysis must inquire (1) whether leaders in Bosnia, Serbia and Rwanda have been prosecuted and whether this has undermined their influence either directly by their being detained or overthrown or indirectly by being politically marginalised; (2) whether indictments have provided motivation for political and military leaders and their superiors to omit actions that would cause atrocities; (3) whether the *ad hoc* tribunals have contributed to (re)establishing the rule of law by virtue of their decisions creating actual precedence for the national judiciary; (4) whether decisions of the *ad hoc* tribunals have been perceived as impartial prosecution of guilty individuals and not legal persecution of ethnic groups; (5) whether the judgements of the ICTY and the ICTR have gained momentum as a truly truthful, impartial account of what happened during the war in Bosnia and the genocide in Rwanda in 1994 and, consequently, whether and how this message is getting through to the public in former Yugoslavia and Rwanda; and (6) whether the work of the ICTR and the ICTY has prevented revenge killings.

IV. Data sources

Are our data fitted to measure what our theory prescribes? The empirical material analysed in chapters V and VI, structured by the six points above, is based on five kinds of data sources: 1) academic works, 2) NGO reports, 3) official documents, such as UN documents and documents of ICTs, 4) news reports (articles in newspapers, printed and internet based), 5) works of 'high journalism', a mix between academic works and news reports. None of my sources are primary. Generally, when it comes to detailed empirical material, such as political reactions to decision of the

ICTY and the ICTR, the texts preferred here are those that (1) are in the closest proximity with the primary sources and the events in question (Dahl 1966:59) and (2) make critical assessments of the information from primary sources (Marwick 2001:155). The most reliable of these are the NGO reports, whose analysis are exclusively based on own field research and interviews of several primary sources, weighing testimony against testimony, establishing facts. Some works in high journalism also meet these criteria, but are often theoretically dubious. Where news papers are cited directly the analysis most often draws on several news papers, utilising more than one source or informant, to increase the likelihood of the information at hand being reliable and thus useful for our purposes. But the empirical analysis does not at all times, on all counts, fulfil Yin's criterion of *triangulation* (Yin 1994:90). However, this criterion is usually met in the quite reliable NGO reports, such as those by ICG, AI and HRW. When academic sources appear particularly problematic this is discussed - such as literature on Rwanda in chapter VI, section II.

V. Case selection

In accordance with the main research questions stated in chapter I, only two empirical cases are relevant. The main general research problem was *how can ICTs contribute to building sustainable peace in post atrocity societies?* Given that there only exist two fully operational ICTs the question was specified: *how have the ICTY and the ICTR contributed to building sustainable peace in the republics of former Yugoslavia and Rwanda?* This main research question reflects that universe of possible cases consists only of the cases 'ICTY and former Yugoslavia' and 'the ICTR and Rwanda'. These cases also "[r]eflect strong, positive examples of the phenomenon of interest" (Yin 2003:13).

Of the six republics that constituted the federal state of Yugoslavia, only three are selected here. *Bosnia* is selected because the war there endured longest, was the most devastating with the worst atrocities, and therefore most cases before the ICTY regard situations in Bosnia. Politicians in Serbia and Serb politicians in Bosnia were initially the main aggressors, although all sides committed grave crimes, and as

pointed out in chapter V this is the main reason that the majority of the ICTY indictees are Serbs. The main reason for commenting on *Serbia* is Serbian role in the war in Bosnia and Croatia and due to this it is of vital importance how the ICTY's work has affected Serbia. *Croatia* is selected for much the same reasons as Serbia, i.e. because of Croat role in the war in Bosnia, crimes committed by Croats in Bosnia and in Croatia, and the fact that several Croats have been indicted and prosecuted by the ICTY. In sum, peace building in former Yugoslavia depends on how things have developed in Croatia, Serbia and particularly Bosnia after 1995. Peace building obviously also depends on the developments in Kosovo. However, Kosovo is a case in its own right and the space here does not allow us to analyse it. In addition, it falls short of our main criteria because it was not until 2005 persons indicted for atrocities committed in Kosovo 1999 surrendered to the ICTY.

VI. Comparative strategies

The cases 'ICTY and Bosnia, Croatia and Serbia' ('former Yugoslavia') and 'ICTR and Rwanda' were in the end selected because they simply exhaust the universe of possible cases. The present inquiry is thus a sort of "small N - many variables" strategy. It is also a multiple case study inquiry because it (a) defines "research topics broadly", (b) covers contextual or complex multivariate conditions" and (c) relies "on multiple [...] sources of evidence" (ibid:xi). The nine lessons summed up in chapter VII are *inductive* and frankly they constitute no general or coherent theory. However, 'the goal is inference' (to paraphrase King, Keohane & Verba 1994:7) and theory development, hence the approach of 'lessons'. These lessons may also serve as a sketch for further theory development, usually an aim of explorative case research (Yin 2003:5).

Given that the goal is theory development or improvement the empirical case analyses must rely on a methodological strategy that enables us to utilise the information in the way most desirable. The dilemma is usually whether to apply a *most similar* or a *most different system* strategy. But regarding our two cases there are several problems with applying any such comparative strategy in strict a sense: first,

the cases are more or less given in that they are the only two cases in the universe of potential cases and it is not sure that they can be treated as either a most similar or most different systems at all. In fact, it seems that neither of these designs is applicable to our cases. And an unwarranted application of a rigorous comparative design would lead to such a substantial loss of information that it would be counterproductive to our purposes.

Second, the purpose of applying “middle range” methodological strategies is “isolating the effect of an independent variable on the dependent one by controlling for as many potential variables as possible” (Tranøy 1993:24). In other words, the goal is usually explanation of either different or similar outcome on a dependent variable. As underlined, however, such explanation is not a main aspiration of this thesis. On the other hand, the scientific position of comparative “small N- many variables” strategies lies somewhere between nomothetic and ideographic ideals (ibid:23). The present inquiry leans more towards the ideographic, following Bendix (1977) quoted from ibid:22): “By means of comparative analysis I want to preserve a sense of historical particularity as far as I can, while still comparing different countries. Rather than aim at broader generalizations and loose that sense I ask the same questions of divergent materials and so leave room for divergent answers.” This is the “loose” kind of comparative strategy chosen in this thesis.

The analysis in chapter VII does not follow neither George’s nor any other given comparative design all the way and thus it is merely a *quasi comparative* design. I still believe that systematically assessing the material into *lessons* is useful and justified. The analysis is comparative and structured in the sense that it is an inquiry into the same general questions, stated in section III above.

Chapter IV: The International Criminal Court

I. Prevention of international crimes

On July 18 1998 The Rome Diplomatic Conference adopted The Rome Statute of The International Criminal Court (hereinafter *the Statute*) after 120 out of 148 states had voted in its favour. Later that day, the UN S-G, Kofi Annan, declared in a speech to the delegates that “This is indeed an historic moment. Until now, when powerful men committed crimes against humanity, they knew that as long as they remained powerful no earthly court could judge them” (Bassiouni 1998:xiii). This accurate comment goes straight to the heart of the ICC and its mandate by exposing the core intensions at work behind the establishment of this first permanent instrument of international *criminal* justice. In the same spirit the *Preamble* of the Statute declares that the states parties to the court, by its establishment, intend to “put an end to impunity for the perpetrators of [the most serious of international crimes] and thus to contribute to the prevention of such crimes”.

Prevention being the ultimate end of the ICC, and all ICTs, it is the central assumption of this thesis that this essentially means engaging in post war peace building, a point discussed in chapter I and II. This in turn means working in concert with a number of other institutions and actors collectively pursuing the purpose of furthering the over all process of building a sustainable peace in post atrocity societies. Justice is merely one dimension of this complex endeavour and the impact of ICTs is dependent upon cooperation with a variety of actors. ICTs presumably achieve their goals by producing various indirect effects on the processes of peace building, among other things by affecting the old political, now criminal, elites and by staying the hand of vengeance. However, as was hypothesised in chapter I and II and eventually demonstrated in the two succeeding chapters, prevention is not attained through deterrence.

The main instrument of ICTs is the just and adequate enforcement of ICJ in courts of law. Whether it actually works according to the intentions is a head on empirical question, which will be closely examined in the next two chapters. But in order to determine the preconditions of ICTs' abilities to contribute to prevention we obviously have to examine the instruments and inherent institutional means of ICTs themselves. The instruments at ICC's disposal are defined in the Statute. This chapter therefore describes the mandate and jurisdiction of the court and provides an analysis of the Statute, focusing on the perks it provides as well as the strains it puts on the ICC and its abilities to achieve the goals defined in the *Preamble*.

II. The historical backdrop of the court

The idea of a permanent international criminal court is an old one and has evolved alongside the notion of international crimes and largely arrives from normative notions of an international society (and humanity) as such. It is also a normative-legal response to political-technical developments (Donnelly 2003:57-8). The first explicit suggestion to establish such a court was articulated by Gustave Moynier, one of the founders of the International Red Cross movement. The idea was to create a permanent legal body to punish violations of the first Geneva Convention of 1864 but the proposal never gained any significant amount of political support. The next big step in the development of international law came with the drafting and adoption of the Hague conventions of 1899 and 1907. The 'Hague law' was the first sincere attempt at legal regulation of armed conflict and, in effect, international affairs. The obvious drawback of the Hague law, however, was that though it defined certain acts as *illegal* it never tried to *criminalise* them - due to the lack of institutional backup. The responsibility still rested neatly with the states themselves and their Westphalian sovereignty and individuals were not yet defined as international legal subjects. Although it was in large replaced by the Geneva conventions of 1949 the Hague law is now codified in the Statute of the ICTY and in Article 8(2)(b),(e) and (f) of the ICC (Schabas 2001:3).

In the wake of World War I some efforts were made to prosecute Kaiser Wilhelm II. The right of the Allies to criminally prosecute enemy leaders was recognised in the Versailles Treaty (ibid.) and at the Paris conference reference to war crimes and the Hague law were made (Bergsmo 1998). However the Kaiser fled to the Netherlands that refused to extradite him on account of the allied prosecutions constituting retroactive justice. Only a dozen Germans were tried in domestic courts ('the Leipzig trials') and received mild sentences. The interwar years were an era of nationalism and anti-cosmopolitan forces. But at the same time they fostered internationalism, with persons like Woodrow Wilson at front. In the 20s Baron Descamps of Belgium proposed at the League of Nations the establishment of a "high court of international justice" (Schabas 2001:5; Miskowiak 2000:12) but the proposal was dismissed. Internationalists' efforts in the interwar period culminated in 1937 when the League of Nations adopted a treaty defining international crimes and discussing proposals of an international criminal court. Although this attempt stranded in the harsh political climate of the years prior to the Second World War the treaty served as a guiding document to the Allied when drafting the Charter of the International Military Tribunal (IMT) which was formally adopted on August 8 1945.

The IMT was the first (semi) international criminal court in history, and although it represented the 'Victor's justice' in some respects it firmly demonstrated that international law could and had to be transformed into international criminal justice (Taylor 1992; Scharf 1997; Overy 2003). 24 Nazis were indicted and 19 convicted by the IMT, whereof 12 were executed. The tribunal exercised jurisdiction over three categories of crimes, *crimes against peace* by referral to the Kellogg-Briand Pact of 1928, *war crimes* on the legal basis of the Hague law and *crimes against humanity* which in fact was in fact a legal innovation (Overy 2003:15). The prosecutors used the recently coined term *genocide* but upon sentencing the defendants the judges deployed the term crimes against humanity to cover the Holocaust atrocities.

The legacy of the Nuremberg trials is enormous: in its rulings the IMT above all stated the principles of the inescapable criminal liability of all morally capable

individuals and that individual criminal accountability must be assigned for international crimes without any regard to state sovereignty, national laws or domestically lawful orders. In its first session the General Assembly of the newly established UN confirmed the principles and definitions of the Nuremberg trials (Res 95(I), 11 December 1946) and in 1950 the International Law Commission (ILC) defined and codified ‘the Nuremberg principles’ as customary international law. Directly inspired by the trials the Genocide Convention was adopted in 1948 and in Article VI it demanded that breaches of it ought to be tried before a competent court in the state where the atrocities took place or before “such international penal tribunal as may have [relevant] jurisdiction...” Drafting a proposal to such a court was among the main priorities of the ILC but the cold war ensured that no real progress was made until 1989. So, “When the international criminal court idea took off again in the 1990s, it was against the trend of [...] the previous forty years” (Crawford 2003:122). At the initiative of Trinidad and Tobago the GA on December 4 1989 mandated the ILC to consider the possibilities of establishing an international criminal court, which it did in 1994. On basis of the ILC draft statute the GA in turn established the *Ad Hoc Committee* and the *Preparatory Committee*, both open to all UN member states. The latter eventually came up with the draft that served as the discursive basis of the Rome Conference.

III. The main provisions of the Statute

The Statute consists of 13 parts and a total of 128 articles. According to art.3 the ICC shall be situated at the Hague but may sit elsewhere if it so wishes. As set out in art.34, the court itself is composed of the (a) The Presidency, (b) an Appeal Division, a Trial Division and a Pre-Trial Division, (c) The Office of the Prosecutor and (d) The Registry. The highest decision making organ of the court is The Assembly of States Parties (the ASP) where each state has one representative (art.112). To become a state party a state has to ratify the Statute, thereby unconditionally accepting its inherit jurisdiction. Once ratified, “No reservations may be made to this Statute” (art.120). As of April 1 2005, 98 states have ratified (see, www.icc-cpi.int).

The court shall employ a total number of 18 judges (art.36) elected by the ASP for nine years in office with no possibilities for re-election. All judges, including the presidency, were elected during 2003. President is Judge Philippe Kirsch. The prosecutor, Luis Moreno-Ocampo, was sworn in on July 16 2003.

The court shall be financed through “Assessed contributions made by the States Parties” (art.115(a)), voluntary contributions (art.116) and funds “provided by”, that is, established by the UN subject to approval of the GA (art.115(b)). The chosen means of financing can be expected to wield a financially more independent institution than the *ad hoc* tribunals. They are wholly dependent on the UN and its strained economy and this has time and again had an undesirable effect on their efficiency. It remains to be seen the financial independence is a liability as well.

Witness and victims protection (program) is impressive (art.54,57,68) compared to the *ad hoc* tribunals. Furthermore, explicitly declaring a number of general principles of criminal law (Part 3) does bestow the court with a high degree of normative-legal legitimacy. This is of crucial importance considered that the court is result of a series of political and legal compromises and, in effect, that it is an institutional hybrid made up of elements from a number of legal systems and that it contains provisions bluntly representing divergent political interests.

III.I The jurisdiction of the ICC and its preconditions

Provisions on jurisdiction are to be found in Part II of the Statute, articles 5-11. The preconditions for exercising it are defined in articles 12, 13, 14 and 20. Articles 17, 18 and 19 describe the “admissibility” of cases, and are in addition to the ‘preconditions’ further restrictions on the jurisdiction. Such constraints are however in accordance with the principle of *complementarity*, stated in the Preamble and art.1. Contrary to the *ad hoc* tribunals the ICC is ascribed a function complementary to national legal systems: whereas the ICTY and the ICTR enjoy precedence over national jurisdictions the complementarity provisions mean that the international crimes within the subject matter jurisdiction of the court, *grave war crimes*, *genocide*

and *crimes against humanity* (art.5-8), will preferably be prosecuted by the state parties' domestic courts. National courts thus enjoy legal primacy over the ICC, except in certain cases admissible to the court. Generally, several arguments have been made about the advantage of national justice systems serving international criminal justice (Miskowiak 2000). Regarding the complementarity, the term is "something of a misnomer" for the relationship to national legal systems is far from being merely complementary (Schabas 2001; Miskowiak 2000; Meron 2001). Rather, appears opposite or competitive in nature.

Preconditions for exercise of the ICC's jurisdiction are that either the state where the accused is a national has accepted the jurisdiction of the court (art.12(2)(b)), either by being a state party or *ad hoc* (art.12(3)), or that "the state on the territory of which the conduct in question occurred" has accepted it (art.12(2)(a)). If these preconditions are satisfied, the court can begin to exercise its jurisdictions over the crimes listed in art. 5 given that "a situation [...] is referred to the Prosecutor by a State Party" (art.13(a)), or by the UN SC, acting under Chapter VII of the UN Charter (13(b)). The third possible solution to initiate an investigation is for the Prosecutor to initiate investigation (13(c)). Before opening a case there remains a process of 'checks and balances' involving the Pre-Trial Chamber and its acceptance of admissibility, preliminary rulings on admissibility, notifying states, etc (art.18 and 19).

There are several possible ways of reading and interpreting these articles. Miskowiak (2000:24-26) offers a progressive reading of article 12. She emphasises the *or* in paragraph 3, which declares that it will suffice for the court to have jurisdiction in a given case, that the crime in question is either committed by a citizen of a state that has accepted the ICC's jurisdiction, *or* that it be committed on the territory of a state that has formally accepted it. This actually means that under certain circumstances the court will have jurisdiction over crimes committed by citizens of states not having accepted the courts jurisdiction: it will for instance suffice that a crime is committed on the territory of a state that *ad hoc* accepts the jurisdiction of

the ICC and in such cases it does not matter that the perpetrators are citizens of states actively defying the court (such as the USA, Libya or Israel). A relevant example would be a Zimbabwean citizen involved in war crimes in the DRC, which despite its political, military and humanitarian chaos has ratified the Statute. Zimbabwe, under the dictatorship of Robert Mugabe, has not. The example is highly relevant because on June 23 the Moreno-Ocampo, announced opening of an official investigation into grave international crimes in the DRC.

III.II Admissibility of cases and the relations to national legal system

Whereas jurisdiction refers to “the basic legal parameters” of the ICC questions of admissibility enters the judicial process at a subsequent stage when a case has already appeared (Schabas 2001:55). A case is inadmissible to the court if the case is being investigated by the state in question, “unless the state is unwilling or unable to genuinely to carry out the investigation or prosecution” (art.17(1)(a)), or has been properly investigated by a state. Secondly, a case is equally inadmissible if the concerned person “has already been tried for the conduct [...] and a trial by the Court is not permitted under Article 20, paragraph 3“(art.17(1)(b)). That paragraph forbids the court to try a person already tried for the crimes defined in art.6, 7 and 8 unless the trial of the person was inadequate and conducted to shield the person (say, a top politician) or if it did not adhere to relevant standards of impartiality. The third kind of situation of inadmissibility may arise when the court finds that a case is not of sufficient *gravity* (art.17(1)(c)). This provision is in strict accordance with the declarations in the Preamble that the court shall only deal with the “worst crimes of concern to the international community”.

All these provisions must be interpreted as representing constraints on the court’s ability to exercise its jurisdiction and are thus conditions unfavourable to international justice as such - that is, as long as nation states are not furthering its cause. But in spite of these strains the rest of article 17 seems to favour the ICC: the court itself shall determine whether a state is unwilling or unable to genuinely investigate or prosecute (art.17(2)). A state is perceived as unwilling if the

proceedings are “undertaken [...] for the purpose of shielding the person concerned” (art.17(2)(a)), or there are unjustified delays in the proceedings (art.17(2)(b)), or if the proceedings were not conducted in an independent and impartial (art.17(2)(c)). Furthermore, art.17(3) reads that the competence to determine whether a state is unable to investigate or prosecute properly also rest with the court itself. The notions of unwilling and unable are thus defined in the Statute and the court is vested with the authority to assess the practical interpretation in any given case. However, the adjective *genuinely* is not specified, although it can reasonably be taken to mean ‘adhering to relevant international standards’, ‘taking all appropriate measures’, or the like.

This means that it is a part of the ICC’s own legal competence to determine if case is inadmissible or not. This is confirmed in article 19(1) which reads: “The court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.” These provisions are in fact not only legal but political instruments as well. Unwillingness of the concerned states was and has for years been the main justification for the existence and work the ICTY. But in several respects the states of the former Yugoslavia were also unable to deliver criminal justice. Regarding inability an even more appalling case in point is Rwanda: decimating the elites was an essential part of the genocide and this left the country with a devastated judiciary and only a small number legal scholars.² Schabas (2001:68) points out that the possibility of the ICC taking over cases where states are not willing or able to genuinely prosecute seems to favour democratic states marked by a high degree of *Rechtsstat*. However, of more than half of the 98 states parties do not fit this category. Hence, there is [c]ertainly a danger that the provisions of Article 17 will become a tool for overtly harsh assessments of the [judiciary] of developing countries” (ibid.).

² Different authors operate with different estimates: Harpster claims 14, both Corey & Joireman (2004:81) and Zorbas (2004:34) refer to AI’s Gacaca-report (2002) supposedly estimating that there were only ten lawyers left; unfortunately AI does not state any exact number – prudently, because such numbers are impossible to verify due to lack of statistics. A

Two smaller restrictions on the overall jurisdictional potential of the ICC are found in art. 11 and 26. Article 11 states that the court has no jurisdiction over crimes committed before its entry into force. This merely a confirmation of the general principle of legality, or *nullum crimen sine lege* (latin=no crime without law) stated in art. 22 which prohibits retroactive criminalisation (see also art. 23 and 24). Article 26 allows the court only to try persons who were 18 years or older at the time of crime. The maximum punishment available to the court is 30 years imprisonment and in certain cases lifetime sentences. The court cannot impose death sentence upon defendants.

IV. Political potentials and problems

As repeatedly indicated, the ICC is heavily dependent upon the will of political institutions and instruments. In cases involving non-member states the court will have to rely on international institution such as NATO, as ICTY in Bosnia, and in several cases the UN and the SC. Third party states may also have to arrest and extradite indictees and can even be expected to conduct trials.

IV.I Cooperation

States parties are obliged to provide full cooperation with the court, as defined in *Part 9. International Cooperation and Judicial Assistance*, art. 86 to 98. Art. 86 “lays down an unequivocal general obligation” (Miskowiak 2000:61) for states parties to cooperate fully with the court. Such cooperation includes extradition of indictees, providing police assistance such as the arrest and contemporary imprisonment of suspects, accessing crimes scenes for the investigators, assisting investigators, handing over evidence to the Prosecutor, etc. A main challenge for the court will of course be the all too apparent lack of a police force of its own³, a challenge which has at times severely tested and diminished the efficiency of the *ad hoc* tribunals. But

more viable approach is that of Tiemessen (2004:59) that contends that “As late as 1997 courts [...] were left to function with only 50 lawyers.”, a fact that is more illustrating than the exact number of lawyers immediately after the genocide.

³ On December 22, 2004, the ICC and Interpol entered into a comprehensive cooperation agreement.

again, this feature too is drafted in accordance with the principle of complementarity. The ICC will in other words have to rely on the cooperation of the states concerned on a case-to-case basis. Miskowiak concludes that the general obligation of art. 86 “[w]ill be the starting point when specific questions of cooperation and judicial assistance arise...” (ibid.). It is also worth noting that if states fail to cooperate fully with the court, they will find themselves “in breach of SC Resolution 827” (ibid:54).

IV.II The relations to the UN and the SC

Art. 2 declares that the court “shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties”. More important, though, is the complex relationship with the SC and this tie may in some respects prove crucial to the success or failure of the court. The SC is the highest decision making legal authority in the field of international law and this is the main reason for its being granted some influence on the doings of the ICC. Two provisions are of special significance: first, as already mentioned, art.13(b) allows the SC to refer cases to the court, that are within its inherit jurisdiction, without regard to any regard to admissibility and state sovereignty. Thus, the SC may become a major political instrument and allied of the court. This is tantamount in instances of unwillingness of involved states, especially if one takes the court’s lack of coercive means into consideration. Such a referral, however, requires a positive resolution with reference to Chapter VII of the UN Charter and therefore one of the five permanent members may block the referral.

The relation to the SC is further complicated by the fact that two of its permanent members, the USA and China, are actively opposing the ICC and its efforts to attain global judicial significance. The USA has been especially fierce in its defiance of the court: the superpower has conducted a campaign of pressuring more or less allied states to sign bilateral agreements not to extradite American citizens should they be indicted by the court. The main leverage employed by American officials is the potential withdrawal of economic and military assistance. According to AI 37 state parties have signed such agreements (see,

http://web.amnesty.org/pages/int_jus_icc_imp_agrees) violating their obligations. In this respect the USA has certainly achieved its goal of undermining the authority and powers of the court.

Another drawback of involving the SC is the risk of politicising the pre-trial affairs of the ICC. Once the question of whether a case will be referred to the ICC is made dependent upon the will of the SC, simultaneously it is made political on a more narrow sense. It invites conflicting national interests into a “higher order” global legal-normative issue.

The second provision is contained in art. 16, which allows the SC to bar the court from proceeding with a case “for a period of 12 months“. To defer an investigation the SC must adopt a positive resolution acting under Chapter VII of the UN Charter. Again, this may trigger the use veto by one of the five permanent members. Contrary to the effects of art. 13(b) though, here the requirement of the SC adopting a positive resolution may work to the advantage of the ICC. The obvious reason is that one of the veto powers may hinder the council from obstructing the court’s proceedings making (Schabas 2001:66). In addition art.16 allows for annual renewal of such a resolution and each renewal requires a positive resolution.

One final disadvantageous provision found in the Statute is the so called ‘opt out clause’ in art.124, which permits states parties, when becoming members, to declare exception from the court’s jurisdiction over war crimes in case their nationals would become suspects. Thus, for a period of seven years it will be legally guaranteed that the court cannot indict nationals of states evoking this article, for the commission of war crimes. The clause was incorporated into the draft and adopted as a part of the Statute as a result of a French initiative. Critics pointed out that France was drawing on the experience from the Rwandan crisis where it played a dirty role allowing Hutu *génocidaires* to flee through an area controlled by France during “Operation Turquoise” (Destexe 1995:54-7; Prunier 1995:281-305).

V. Concluding comments on the potential impact of the court

Given the provisions on complementarity, that seem to place the ICC in opposition to national jurisdictions and in some aspects gives precedence to national proceedings, we must - given the hope of preventing international crimes - and ask whether and how the ICC can conceivably contribute to a trend of more and genuine *national prosecutions of international criminals*. How can it make legal impact on its member states enhancing their willingness to deal with international crimes under universal jurisdiction? Based on the analysis of the Statute in this chapter, several aspects have appeared in this matter: (1) the possibility of the ICC taking a case, thus depriving the state in question of jurisdictional sovereignty over its citizens, may actually prove a deterring threat to states. This may be perceived as a good reason and reasonable incentive for states themselves to prosecute in a fair manner.

(2) There also lies an opportunity in the power of the SC. The provisions allowing SC to override national sovereignty and refer cases to the ICC against the will of states, is also a source of deterrence. This possibility may become an incentive for states to provide adequate prosecutions, whether the crimes are committed there or the perpetrators are citizens of that state. Due to these provisions states may detect an outright self interest in carrying out international criminal trials solely in order to prevent the ICC from taking the case. A third (3) and closely related effect is that, as a part of such consideration states may view it as desirable to amend their national laws in order to prosecute international crimes themselves.

These are all likely scenarios. Whatever the impact of the ICC's work and existence on states' behaviour, it may be reasonably predicted that it will not go unnoticed. In fact, experience so far shows that most states have strong opinions on 'the ICC issue'. Most likely the court will contribute to states changing their behaviour at certain occasions. And finally, (4) there is the possibility of states perceiving the court as a useful instrument - that it might come to their aid in times of dire straits. Picture a country ridden with civil war, where the need to arrest and prosecute criminal leaders is immanent. In such cases an international criminal trial may relieve a national judicial system of a heavy burden - both if it lacks prosecutorial

capacity and because a national trial would not be impartial due to bias, corruption and the controversial nature of the case. This is roughly the pretext of the following events:

On January 29 2004 a historical press conference was held in London. The main actors were the Chief Prosecutor of the ICC, Mr. Moreno-Ocampo, and the president of Uganda, Yoweri Museveni. The occasion was that a few weeks earlier Museveni had 'referred' the situation in Uganda, a state party, to the ICC asking the court to investigate atrocities committed by the Lord's Resistance Army (LRA). And in March 2004, the government of another African state party⁴, the DRC, formally referred the situation in the country to the ICC. Acting upon this precedence Moreno-Ocampo on June 23 2004 announced his decision to open investigation into the commission of grave international crimes in the DRC since July 1 2002. Following more lengthy legal considerations and an eventual authorisation from the Pre Trial Chamber on July 7 Moreno-Ocampo announced the decision to start investigations into such crimes committed in Uganda.

In respect of future the reverberations of the ICC the significance of these events cannot be overstated: the referral of situations by the states themselves has offered the fledgling court an almost ideal start, of which the ICTY and the ICTR could only dream of. The promise of active state cooperation naturally looms large and expectations are high. But before applauding such grand ideal scenarios we should not forget that the ICTR was established at the initiative of Rwanda but once it started to work it soon came clear that the very same government had become the single greatest obstacle to the tribunal's progress (in addition to the financial clumsiness and administrative incompetence tarnishing its potential efficiency (Yacoubian 2003: 11). At any rate, because the affected states *themselves* prefer the ICC to investigate their

⁴ In January 2005 a third state in the region, the Central African Republic, referred the situation in the country to the ICC. And on March 31 the UN SC referred the grave situation in Darfur, Western Sudan, to the ICC.

atrocities the existence of ICC appears largely justified: ICC ‘makes a difference’ and is able to trigger states’ self interests. The potential impact of ICC’s efforts in Uganda will be briefly commented in the Epilogue.

Chapter V: The ICTY and its impact on former Yugoslavia

I. Resurrection of genocide

In the early 1990s the international community reluctantly witnessed the worst incident of gross human rights violation to take place on European soil since the Holocaust. The wars in Yugoslavia (1991-95; and 1999, Kosovo) and the atrocities committed as a part of these wars were in Western media conceived as the impossible coming true. In the summer of 1992 rumours of concentration camps swirled among refugees from Bosnia and Herzegovina (B&H) and it became clear, eventually, that many of these were not fleeing war zones but had been forced to leave as a result of “ethnic cleansing” (Bergsmo 1998:78-80). In August a brave news reporter, Newsday’s Roy Gutman, managed to bring pictures of concentration camps in Omarska and Trnopolje. In the West everybody was asking: how could genocide once more take place in Europe?

In the view of the Croatian authoress, Slavenka Drakulic (2004), lack of truthful public memory based on facts may be the most important factor that helped making the impossible possible in the first place. Too many generations have, as a part of the authoritarian legacy, forgotten about the horrors of the past. And if the generations that have experienced the recent wars do not make a collective endeavour to construct and consolidate a truthful public memory of the wars in the 90s, they undoubtedly risk letting the conflicts linger on. Today, a decade after Dayton, the problem in Bosnia is indeed that despite the absence of group violence, mainly thanks to enduring and heavy military presence, the conflict that turned violent in the 90s is by far resolved (Cousins 2001).

This chapter further addresses the above issues and raises the question: *has the ICTY contributed to building sustainable peace in B&H, Croatia and Serbia and so*

prevented the reoccurrence of international crimes? Part II gives a brief account of the roots and causes of the conflict, the outbreak of war and consequently the background for the commission of international crimes in Yugoslavia. Part III contains an empirical analysis of the impact of the tribunals' work on part of the societies in which the large scale crimes were committed and in which both victims and perpetrators live and have lived. Finally, in part IV, some concluding remarks address the theoretically motivating questions. The main argument in this chapter is that the ICTY has, to a certain degree, been able to contribute to the multi level, multi actor process of building the foundations for and thus facilitating sustainable peaceful relations in some of the former Yugoslav countries. The main effects of the ICTY do be detected are staying the hand of vengeance, establishing an impartial truth and delegitimising the old political elites ('spoilers'), thereby reopening political space for more moderate political actors.

II: The wars in Croatia and B&H: the backdrop of international crimes

In Tito's Yugoslavia serious political conflict between the cultural-ethnic groups and the centrifugal forces of nationalism, ethnic identity and longings for political autonomy were repressed by the communist regime. By Tito's death in 1980, economic crisis in the 80s and the collapse of the Soviet Union and the stabilising threat it had posed, these forces were left unchecked. Political liberalisation and demise of communism paved the way for the rise of aggressive nationalism "from the top" (Scharf 1997:25). In 1987 Slobodan Milosevic was elected Serbian president and soon became a main advocate of Serb nationalism. His nationalistic attempts at dominating the federal state sparked fierce Croatian and Slovenian nationalism. Although Croatia and Slovenia initially wanted a looser federation that could balance Serb nationalism, when talks with Milosevic over constitutional change stranded both republics declared independence on June 25 1991. On Milosevic' order the Serb dominated Yugoslav National Army (JNA) entered Slovenia and Croatia "to protect Serbs living" there (ibid). JNA soon pulled out of Slovenia but in Croatia, with a substantial Serb minority, the JNA and Serb militia took hold of about one third of

the territory. Serb community in Krajina, supported by Milosevic, declared its own autonomous republic.

According to Crampton (2002:239) three main processes were occurring in the crucial period from “the constitutional changes in Serbia in March 1989”, depriving Kosovo and Vojvodina of its autonomous status guaranteed by the 1974 constitution, “until the outbreak of the Bosnian war in April 1992”: 1) political liberalisation at republic level, “which allowed the nationalist parties to become active”; 2) federal institutions and, in general, central social institutions “decayed or were destroyed”; 3) and the Yugoslav conflict and crisis became internationalised. We might add two additional, closely related processes: 4) the process whereby political space was nationalised, enabling effective, aggressive nationalist propaganda to dominate public debate, and 5) the process that gradually manifested political conflict as violent.

B&H was more ethnically heterogeneous than the other Yugoslav republics and the conflict over its political future more pertinent. Of its 4.4 million 44 percent were Muslims, 31 Serbs, 17 Croats and 5.5 percent even viewed themselves as Yugoslavs in the 1990 census. In late 1991 the national assembly openly debated the question of sovereignty. As it soon became clear that the succeeding vote would wield a majority in favour of a referendum, the Serb delegates left the assembly, creating a scene memorable for its political consequences. The leader of the politically and military well organised Bosnian Serbs Karadzic warned “that any attempt by B&H to declare independence would lead to war.” (ibid:254). Prior to this Karadzic had warned that pursuing independence “would make the Muslims disappear because the Muslims cannot defend themselves if there is war” (Scharf 1997:27). The ballot, held on 29 February-1 March was, as anticipated, boycotted by the Serbs in B&H (Mønnesland 1999:256). Partly due to this, it produced a vast majority in favour of independence, which consequently was declared on 3 March. On April 6 1992 B&H was recognised as an independent state by the EC (Malcolm 1996:234). The same day serious fighting broke out in Sarajevo (Crampton 2002:255) and on April 7 Republica Srpska was declared (Agrell & Alcalá 1997:181).

By the time of the signing of the Dayton accord in late 1995 Bosnia was a devastated society: about 250.000 had died as a result of fighting and killing, approximately 200.000 were injured, 13.000 were characterised as invalids and about 2.5 million people were assigned the status of refugees (Seim 1999:285). The refugee problem, alongside the general state of chaos and lack of authority, represented the most immediate and thus the greatest challenge to any attempt at societal restoration (Weiss Fagen 2003:7,75). The goal of Serb, and eventually also the Muslim and Croat forces, in B&H (and Croatia) was to conquer territory in order to create ethnically homogenous areas. These goals were dictated by the political elites advocating nationalist ideology. All sides in the war in B&H committed grave international crimes and civilians were, as members of ethnic communities, a target of warfare. Commenting on the long term effects of the wars and the atrocities, Ramet maintains that “[t]he psychological effects of the war are likely to outlast this generation.” (Ramet 1998:184). And in virtue of the traumas inflicted upon the children, “the next generation has already lost its innocence” (ibid:185).

III What is the impact of the tribunal?

Chapter II provided a theoretical discussion of the role of ICTs in peace building and suggested how they can, specifically, contribute to building sustainable peace. Recalling the main points from that chapter, Bass asserts that ICT can contribute by “first, purging threatening enemy leaders; second, deterring war criminals; third, rehabilitating former enemy countries; fourth, placing the blame for atrocities on individuals rather than on whole ethnic groups; and, fifth, establishing the truth about wartime atrocities” (Bass 2001:206-7). Bass hereby provides a handy framework for structuring the empirical analyses of the assumption that the ICTY has contributed to peace building, although mostly in an indirect manner but also directly by addressing some of the causes of conflict, especially the role of political elites. As in chapter II in the analysis below Bass’ points are, however, amended regarding several dimensions or otherwise altered and improved where the original categories do not fit in light of new empirical knowledge and alternative more plausible interpretations.

III.I Prosecuting threatening leaders, undermining the old elites

In cases of wide spread violence against the civil population, organised violence such as concentration camps, and war scenarios where most societal structures have broken down and chaos rules in what has become a state of social and moral anarchy, such as in parts of Bosnia during 1992-95, a substantial part of the population is involved in the horrors and their making. Carrying out genocide and policies of 'ethnic cleansing' (Allen 1996; Bergsmo 1998; Bassiouni 1994) requires considerable numbers of participants. Consequently, post war societies contain great numbers of criminals, a fact which produces a tricky dilemma to all law enforcement as the number of participants by far exhausts the capacity of any judicial system: we cannot prosecute everyone involved, so who shall stand trial? The ICTY is intended to prosecute only the persons most responsible for the atrocities, i.e. the war time leaders, the key figures. Besides scarcity of resources there are mainly three reasons for this. First, political elites always play a major role in the committing of international crimes because this kind of large scale atrocities inevitably require both systematic instigation such as enduring propaganda in public media, recruitment, planning and social-political organisation (Jonassohn & Chalk 1990).

Secondly, in a world still legally and politically dominated by nation states and national legal systems, international tribunals are, so to speak, the unwished-for-exception and frankly they must expect limited financial resources at most times. This is no doubt the case with both of the UN established *ad hoc* tribunals; they have at times suffered from serious lack of funding. The third reason underpinning this strategy stems from the situation of the post war societies themselves. The urgent need for broad societal and institutional restoration means that as many suspects as possible should be tried before national courts - that is, given that national courts are up to the task. Prosecutors must be qualified of conducting adequate investigations and courts must possess the qualification as to rendering the accused a fair trial. Another important prerequisite for national and local courts prosecuting persons accused of war time atrocities is witness protection and the institutional capacity to

prevent vengeance and other unlawful actions. As we saw in the previous chapter, *unwillingness* and *inability* are the main arguments for the establishment of ICTs.

The first step in the legal process, the results of which are examined here, is collection of evidence and the ordering of indictments. The second step consists in the apprehension and extradition of suspects. And the third step, or more correctly: process, is of course the trial in a court a law.

III.I.I Indictments and investigations

Issuing indictments has proved a duly and politically challenging process as has the collection of evidence. The main reason for this is identical to the obstacles regarding apprehension and extradition of indictees - it is a purely political one: governments and other political bodies still headed by war time elites fear for their future prospects and political ambitions, and are thus in most cases unwilling to give up any of their present privileges. Authorities in all of the implied states and areas have in some degree or other revealed political resistance and reluctance to assist investigators (Scharf 1997; Neuffer 2001). On location investigations have also had to face other, closely related problems. Evidence, for instance, has been removed in several cases (Allen 1996: 65-7). This happened in Srebrenica where mass graves or parts of mass graves disappeared over night (Scharf 1997:42-44).

In all fields relevant to the over all process of carrying out ICJ in the countries of former Yugoslavia, there are matters that fall outside the mandate - both as strictly construed and well as defined in normatively reasonable terms - of the ICTY. Regardless of the exact interpretation of the mandate it must be acknowledged that there are a lot of issues, which are mostly beyond the reach of the tribunal itself. Therefore the ICTY is not to blame for matters like missing evidence when it has been removed when investigators have been away from the crime scene (after that, they were sleeping on location (Bass 2000:266)), unwillingness to extradite suspects, lack of financial resources, etc. On the other hand, the tribunal does preside over subtle instruments such as the timing of indictments, a crucial political aspect of its

work, its internal routines, rules and procedures, the handling of cases, efficiency, the enforcement of essential principles like legality of decisions, impartiality or the right to appeal, and witness protection measures, etc

The tribunal's three Chief prosecutors, Richard Goldstone, Louise Arbour and Carla del Ponte, have made somewhat different approaches and have maintained different stiles regarding matters like the time of issuing indictments, who to indict when, etc. Whereas Goldstone embarked upon a strategy involving public indictments strong and rather frequent public statements (ibid:220-223) carving out a political tool kit and hoping to influence national and international decision makers as well as public opinion, Arbour chose to issue secret indictments, only known to the tribunal itself and SFOR relevant forces. To be sure, all prosecutors have had their moments of both success and failure.

III.I.II: Apprehension

Apprehension has been perhaps the biggest obstacle to enforcement of ICJ in former Yugoslavia. There seem to be two main reasons for this: 1) apprehension of suspects was not adequately addressed in the Dayton accord and the accord left the task to the states themselves thus overlooking the appalling fact that war time criminals were still in power in all states; and 2) the all too striking reluctance of NATO troops, especially the American IFOR and SFOR forces, to arrest indictees. The explanation for this reluctance is political, and its being political sheds some light on the systematic nature of the observed lack of will to intervene: the shadow of the failure in the Somalia intervention in 1993 and Clinton's reelection strategy hooked up on worries about American lives being risked on the ground were interrelated and mutually reinforcing concerns guiding the American approach in Bosnia and the leading interpretation of the mandate of the SFOR.

This has had a devastating effect on the peace building in B&H. One thing is the partly understandable fear of risking a bloodbath when trying to arrest war lords such as Mladic, Karadzic or Arkan, surrounded by hoards of bodyguards. But it is a quite

different and by no means acceptable matter when NATO troops let Mladic pass through NATO check points without lifting a finger, let alone a gun (Neuffer 2001:175-9). There have been made several reports on observations of this kind, for example, Mladic going skiing and passing several SFOR check points (ibid:176), driving around in his Mercedes, appearing on TV boasting about his freedom (ibid.) and Karadzic attending theatres staging his plays (BBC, 11.30.04).

III.I.III: Formal judicial accomplishments of the tribunal

As of October 1 the ICTY has initiated the total of 84 cases and handed down final judgement in 34 cases, involving over 40 persons of whom five have been acquitted as not guilty. Of all indictees, three have died in detention, one after being released and seven before being arrested, including those shot by SFOR forces. 21 indictments have been withdrawn. Of all indictees 13 remain at large. During 2003, the tribunal improved its pace of work and the number of handled cases was higher than ever. In this period five persons pleaded guilty and this increased number may indicate a growing recognition by defenders of the tribunal's legitimacy and judicial sureness.

With special regard to purging the war time elites, some cases are notably more important than others. Among them the cases of former general Radislav Krstic - where the chains of command at work during the Srebrenica massacre were formally exposed, former Republika Srpska president, Biljana Plavsic, and most recently that of Babic who like Plavsic was a regional leader (Krajina). Krstic was sentenced to 46 years imprisonment. Plavsic received an 11 years sentence and Babic 13 years. Both of these former political leaders have pleaded guilty and their cases have contributed to establishing the accountability and criminal liability at top levels among the Serb elites in both Republika Srpska and Croatia. The trial of Slobodan Milosevic is of course of major importance, symbolically and politically, despite all delays, as are those of former Yugoslav president Milan Milutinovic, who surrendered to the custody of the tribunal in early 2003 and of Vojislav Seselj, who surrendered in 2004. Whatever the outcome of the Milosevic trial, it will arguably not bear as great significance as his political downfall and subsequent arrest undoubtedly did.

III.II Purging threatening leaders – political effects

Serbia. In a report AI summed up the developments in Serbian-Hague relations and the status of war time criminals and trials over international crimes in Serbia and Montenegro. The organisation raised its concern about the authorities' perpetuating lack of cooperation with the ICTY "as well as the rarity of domestic war crimes prosecutions" (AI Index: EUR 70/002/2004:1). However cooperation with the tribunal had slightly improved since 2000/1, especially during 2003, the highlight being the transferral of six major indictees to the Hague. These included Milan Milutinovic, former president, Vojoslav Seselj, the ultranationalist leader of the Serbian Radical Party (SRS), former state security chief, Jovica Stanisic, JSO founder Franko "Frenki" Simatovic, and Miroslav Radic (who turned himself in) and his co-accused Veselin Sljivanèanin, both belonging to the so called "Vukovar Three" (ibid:2).

In addition Serbian authorities released a number of documents of importance to the Prosecutor's office but "which hitherto had not been available". "However", the report continues, "this spirit of cooperation appeared to have deteriorated by late June 2003 with the tribunal stating again that documents were unforthcoming, and that 16 indictees still remained at large in Serbia. (ibid:5)" In other words, the relations with the ICTY deteriorated in the aftermath of the death of prime minister Zoran Djindjic. The relations did improve after the elections in December (section IV.III below) where nationalist parties with a populist anti-Hague stance won a majority of the votes and the parliamentary seats. In that respect, the majority of the voting population in Serbia were sceptical of extradition of Serbs to the ICTY. However, as will be discussed in section IV.III, this is not to say that most Serbs are opposed to all criminal proceedings against those of their own nationals for having committed war time crimes of such a magnitude and gravity that they are also of international concern. And as will be discussed section III.V, it rather is reasonable to assume that increasingly more people want to hear the truth about who did what during the wars of the 90s, primarily to get rid of the widespread notions of collective guilt, especially

what is believed to constitute an international image that all Serbs are as guilty as can be. The important case of Milosevic and how his influence was finally undermined will also be discussed in section III.III.

In early 2005, Serbia-Hague relations improved. Kostunica, now prime minister, pursued a policy of dialogue with ICTY indictees in Serbia. He has explicitly refused to apprehend indictees. His strategy is to somehow encourage them to surrender and it appears to have worked: from January to May 2005 9 Serbian indictees surrendered to the custody of the ICTY (www.un.org/icty).

Croatia. Akhavan notes that “the impact of the ICTY on Croatian politics indicates a positive interrelationship between accountability, the moderation of chauvinist ethnic politics and the consolidation of multiethnic democratic forces” (Akhavan 2001: 19). Post Dayton politics and societal life in Croatia must be dealt with as a strictly two-phased affair - during and after the rule of Franjo Tudjman. Until the death of Tudjman (due to cancer) in December 1999 the government and the still aggressively nationalistic political establishment of Croatia actively opposed the work of the ICTY dismissing it as biased and, hence, unjust. This is the most striking parallel to Serbia, the Milosevic era and Serbian nationalists’ dismissal of the legitimacy of the ICTY. Extradition of important ethnic Croat nationals to the Hague seemed simply out of the question and Tudjman consequently “dismissed ICTY investigations of Croat generals as “unprincipled” pressure on Croatia (Akhavan 2001: 20). It was only after Tudjman’s passing away that alternative political actors were allowed to emerge. In the presidential elections in 2000 the moderate opposition candidate Stjepan Mesic won the majority of the votes. This event marked a change that must be perceived as no less than a watershed in contemporary Croatian history, again paralleling the development in Serbia the same year.

After entering into office Mesic actively and explicitly called for cooperation with the ICTY as means of achieving national reconciliation (Crampton 2002; Akhavan 2001; HRW 2001 World Report). That also meant engaging in a politico-ethical discursive battle against the strong residual forces of Croat nationalists, Tudjman’s

successors in the HDZ and the veteran organisations, the latter being an extremist minority with a fatal grip on public opinion. It is worth mentioning that Mesic already long before the death of Tudjman had advocated the importance of holding criminal war time leaders, especially Hague indictees, accountable for their deeds. And in a manner presumably essential to his political popularity Mesic also emphasised the individual nature of criminal accountability. This paramount analytical-ethical acknowledgement is, as Mesic in concert with the ICTY itself has iterated on several occasions, a crucial precondition to national reconciliation in that it must be made clear to the public that international criminal justice is not directed at the Croatian nation as a whole, as a collective entity, but operates strictly at an individual level. For instance during the Blaskic case it was never the Croatian nation who stood trial at the Hague, so to speak. In a civilised world there is no such thing as collective guilt and it is necessary for every political leader to acknowledge this - given that he or she aims at undermining the destructive collective stereotypes of ethnic nationalism. In that respect, Mesic accurately explained that “individualisation of responsibility is a good thing for the Croatian nation” (quoted in Akhavan 2001:20).

In spite of Mesic energetic efforts there are several more or less unambiguous indications of strong anti-Hague feelings among at least certain segments of the population. Mesic and other moderate politicians like former prime minister Ivica Racan have thus not merely been fighting the war veterans and the worst of the extremist politicians. One event indicating strong resentment of the ICTY and in general what has been portrayed as a criminalisation of ‘the heroes of the homeland war’, is the proclamation of Mirko Norac and two other generals to “honorary citizen of the Split and Dalmatian region in April 2002 - that is, after the investigation of the ‘Gospic-group’ had been completed and the [domestic] trial [which will be commented below in section...] had begun” (Drakulic 2004:44). The generals were all Hague indictees.

Republika Srpska. On April 3 2000 Momcilo Krajisnik was arrested in his home during a SFOR raid. During the war in Bosnia Krajisnik was a key member and a

fierce nationalistic spokesman of the Bosnian Serb parliament, established after the Serbs boycott of the National Assembly of B&H symbolically expressed by means of the Karadzic lead march out of the Assembly - as afore mentioned. After the war he was a member of the presidency. He was also a prominent member of the leading nationalistic party, SDS, originally founded in Serbia by Milosevic. Moderate politicians had warned about a potential nationalist backlash and a radicalisation of the political climate if Krajisnik were to be arrested (Bass 2001:288-9). However, his arrest “brought surprisingly mild reactions” and “[p]rovoked neither riots or reprisals against SFOR troops.” (Akhavan 2001: 14).

Akhavan (ibid.) also states that Krajisnik’s arrest did not have a polarising effect on the elections later in 2000. Interpretation of social events is, however, a duly task as attempting as it is demanding and one always runs the risk of strolling straight into subjectivistic fallacies. A proposition such as the one just stated must always be made subject of qualification by means of specific evaluation criteria. Opposite of Akhavan’s interpretation, Kurspahic claims that the arrest of Krajisnik and the conviction of the Bosnian Croat General Blaskic to 40 years imprisonment at the ICTY, another event attracting the attention of media and public opinion which occurred just before the arrest of Krajisnik, was in fact “enough to polarize Bosnians again” (Kurspahic 2003:193). In his view the media coverage gave an indication not be misunderstood: the Bosnian media was in a tri-part state as was the whole country at that time (ibid:190-200); post Dayton Bosnia was (and still is to a certain extent) an ethnically segregated country comprised of three parts each with a public opinion and media of its own. The ethnic segregation and the fragmented media situation will be subject to further comment below. The media polarisation in the wake of these events, offering three opposite interpretations of all politically interesting events, consequently contributed to polarising the elections later on that year. Moderate parties gained more votes in large, important cities such as Sarajevo, Tuzla and Zenica but due to the nationalists standing their ground in other parts of Bosnia, polarisation appears a plausible label denoting the significance of this event.

Equally significant, though, are the reactions of the political elites, that of the extremist parties, especially that of SDS in Republika Srpska, which long cheered Krajisnik as one of its founders, and that of moderate actors. One extremist response was that of Vojislav Seselj, the founder and leader the Serbian Radical Party. On his behest the Republika Srpska division of the party proposed that the Republika Srpska National Assembly should make a public condemnation of Krajisnik's arrest. But the proposal never received a majority in the Assembly and "the moderate political parties, both Muslim and Serb, denounced the proposal as anti-Dayton" (Akhavan 2001:14). The reason for SDS's sudden lack of interest in the fate of Krajisnik may be found in the internal power struggle amongst its leaders, which broke out before the occurrence of this particular incidence.

Although the party (SDS) refrained from any serious efforts to make political profit from the arrest, it portrayed it as a betrayal to the people (ibid:15). The moderate prime minister of Republika Srpska at the time, Milorad Dodik, responded quickly by declaring it was not his responsibility (ibid.) and suggested that the SDS was only making a desperate attempt to using "all available means to disqualify political opponents" (BBC, 04.03.00, quoted in ibid:15). Later that year Dodik was on an official visit to the ICTY. Arising to the occasion Dodik advocated the immediate arrest of both Karadzic and Mladic, pleading his government's intension to cooperate with the tribunal (ibid.). He also stated the importance of individual responsibility and their destructive impact on the fate on the country as the reasons for the necessity of arresting all indictees. In that respect he pointed out that "one of them is already in the Hague" (ibid.), namely general Krstic who was the first to be convicted for bearing responsibility for genocide.

Prior to the Krajisnik incident Dodik had also openly welcomed the arrest of the Bosnian Serb General Momir Talic on August 25 1999, who was apprehended by Austrian police forces while attending to a OECD conference. The arrest did not provoke any significant unrest or retaliation. Colvier thus interprets the event as "further evidence of the increasing acceptance among Bosnian Serbs of the tribunal's

legitimacy” (Colvier 2001:26). Along with Kristic and Stanislav Galic, Talic was one out three generals who served as the highest ranking, commanding officers under general Radko Mladic, bearing the main bulk of responsibility for the massacre in Srebrenica. Contrary to the arrest of Talic, the arrest of Galic by British SFOR troops on December 20 1999, was a dramatic event and consequently unleashed a series of loud reactions. Earlier examples of neutralisation of criminal war time leaders, and thus the impact of the ICTY, include the so called ‘Drjaca incident’: after being indicted, Simo Drjaca, another war time leader in Republika Srpska, and his top cohort, Kovacevic, were removed from power. In July 1997 British SFOR troops tried to arrest Drljaca who being “the most powerful and best armed person in [the] sector” (Prijedor) put up resistance and was killed in course of action (ibid.). The episode led to the arrest of Kovacevic and subsequently to “the exodus of most indictees living in the sector...” (ibid.).

Finally, it is also worth mentioning that after the indictment of Karadzic and after he chose to step down and resign from all official political work as required by the Dayton accord, the SDS were increasingly distancing itself from their once so loudly applauded leader and founder. In the words of Mirko Sarovic, a central SDS official and Deputy President of Republika Srpska at the time, “Radovan Karadzic no longer leads [the SDS] nor is he in any way influencing its leaders. We want to build an open party, a party that does not scare anyone and we are prepared to fight for its new legitimacy and image.” (Akhavan 2001:15, quoting BBC, 04.03.00). Whether the SDS really was moderating its intensions and whether it was sincerely prepared to further interethnic reconciliation, facilitate the safe return of refugees and in general take on a new political stance in accordance with Dayton principles, it no was doubt distancing itself from its former leader and did so explicitly because of his lack of legitimacy. And for whatever reason it is quite clear that Karadzic had become a political liability for the party, most likely due to Hague indictment which in turn made it legitimate to oppose him and to push for his removal. In the end, though, it was Milosevic who convinced Karadzic of stepping down, after having met with a very insisting Richard Holbrook (Crampton 2002; Bass 2000). It is most alerting,

however, that the popularity of Karadzic has dwindled only very slowly. As late as in the spring of 2004, almost nine years after Dayton, as many as 61 per cent of all adult Serbs in Republika Srpska held a favourable view of him (NTB, 03.21.04), a percentage considerably higher than many leaders in democratic countries usually enjoy.

III.III Rehabilitation

As pointed out above, the main obstacles to the ICTY's work in its first years were the same leaders ultimately responsible for commence of war and for a lot of crimes committed in the shadow of war. The problem was that they were still in power.

Serbia. In the new Yugoslavia, comprised of Serbia and its tiny brother, Montenegro, the fierce nationalist propagator, Milosevic, was still in charge. To the surprise of most delegates Milosevic had suddenly made a u-turn at Dayton, consenting to all the five proposed provisions on obligations concerning war time criminals and cooperation with the ICTY (Scharf 1997:88). At the same, underneath, it seems that Milosovic most likely did not think Western states and NATO "would not have the stomach to enforce these provisions." (ibid: 89)

Sadly, it seems his calculations were partly accurate - NATO displayed an embarrassing reluctance to apprehend indictees in Republika Srpska and the West did not sanction Serbia all too heavily when it came clear that the Milosevic regime had no intensions of extraditing indictees to the Hague; the sanctions were at first bearable to the Milosevic regime. In stead, heavy sanctions and the turbulent relations to the ICTY were to play an enduring part in the state propaganda: ICTY's urging for extradition of Serbian indictees just added to the perceived historic victimisation of the Serbian people. But when Milosevic at last was ousted from office in the fall of 2000, the international sanctions against Serbia and the general and increased isolation of the country during his reign more than probably motivated those who took part in the 'democratic revolution'.

A closely related and equally, if not more, important example of how public opinion and the political scene in Serbia developed in the first post Dayton is how the image of Milosevic evolved. In the end most people came to perceive him as a villain, as a criminal leader responsible for a great deal of the misery brought upon Serbia since the demise of communism and the succeeding disintegration of the former Yugoslavia. This important change in public opinion appears a highly likely explanation of the fact that Milosevic actually lost the president elections to the more moderate and much less virulent nationalist Vojislav Kostunica, whose “electoral appeal was that he was an anti-Milosevic Serbian nationalist [allegedly] with a clear dedication to the rule of law.” (Crampton 2002:281). Milosevic’s refusal to accept the defeat in the presidential election on 24 September 2000 was the final whistle blow that awoke the democratic opposition, lit a fuse among the population and finally tipped the political power balance in the favour of alternative actors.

Another feature suggesting that Milosevic came to be viewed as a liability for the future of Serbia, is that even though many were opposed to his extradition to the Hague - which through the political propaganda in the state controlled media was resented as just another unjust purge against a suffering Serb nation - the majority did not seem to oppose him having to face trial in Serbia. On the contrary, Milosevic was now treated as a criminal. Some analysts have unfortunately confused these issues, but to be sure, “opposition to the ICTY does not equate opposition to prosecution” (Akhavan 2001:17) as such. Milosevic was arrested in April 2001. And by irony of fate on June 28, the anniversary of the battle on *Kosovo Polje* in 1389 so essential to the official nationalism of Milosevic, “of the assassination of Franz Ferdinand in 1914, of the enactment of the ill-fated Vidovdan constitution of 1921, and of the expulsion of Yugoslavia from the Cominform in 1948” (Crampton 2002:282), Milosevic was finally flown to the Hague. His trial at the ICTY remains unconcluded. The indictment along with US declarations that if Kostunica were to step into office, the sanctions would be reviewed immediately, in the end made Milosevic a *persona non grata* in Serbian politics. That way, ICTY has contributed to opening the

political space to more moderate actors (Kostunica, Djindic), thereby laying a couple of necessary political foundations for developing a more peaceful society.

In the years after the downfall of Milosevic there have been some improvements in the Serbian relations to the ICTY and notably there have also been some improvements in the workings of the legal system in Serbia. But at the same time, “Milosevic era structures and personnel are still relatively intact in the judiciary, police, army and other key institutions”, the ICG reported in March 2004 (ICG, Europe Report N°154:). Some reforms were initiated during 2002-2003, primarily during the government leadership of the late prime minister, Zoran Djindjic. The main obstacle to legal reform and political and administrative improvements is the widespread corruption, the institutional power of the old *nomenklatura* - especially in the secret services (Aftenposten, 04.07.04), largely dysfunctional republic institutions, a constitution mainly dictated by Milosevic and the strong elements of organised crime. This is no doubt the legacy of Milosevic, which in an indirect manner caused the death of Zoran Djindjic, who was the first sincerely reform oriented prime minister in Serbia. He was assassinated on March 12 2003 (Telegraph, 13.03.03).

Parliamentary elections held on December 28 2003 further dampened any reform oriented spirit in Serbia as right wing and explicitly nationalistic parties won a majority of parliamentary seats. Seselj's ultranationalist party, SRS, became the single largest one with 28% of the votes and 82 out of 250 seats. Milosevic's old party SPS got 7.5% of the votes and 22 seats, as did the party of yet another right wing leader, Velimir Ilc, New Serbia (NS). Vojislav Kostunica's Democratic Party received 18% of the votes and 53 seats. Finally Djindjic's Democratic Party (DS) took 37 seats due to 12.6% of the votes and the 'technocratic' G17+ party got 11.7% and 34 seats. “Only 71 parliamentary seats are held by parties that have maintained a clear and continuous pro-reform stance over the last three years.” (ICG, Europe Report N°154:). Moreover, 104 out of 250 seats in the new parliament belong to parties who's

leaders stand trial at the Hague, and who continue to act antipathetically towards the West, oppose integration with Europe and publicly disdain the ICTY.

On June 27 2004 the president elections in Serbia constituted the third attempt of electing a president since Kostunica stepped out of office. This time it was successful but the two previous election rounds did not attract as many as half of all registered voters, as is required in the electoral law. Boris Tadic received 53 per cent of the votes, defeating the ultranationalist, Tomislav Nikolic, of Seselj's party, SRS. Seselj was at that time in detention in the Hague. When inaugurated on 11 July Tadic became the first president in Serbia since 2002. ICG reported that Tadic's support of Kostunica's government would contribute to reduce the influence of the extremist parties SPS and SRS (ICG Report, July 22 2004:1). "However", the report continues, "the office of the president holds little authority over day-to-day policy-making, and Tadic's election may not translate into real change for Serbian politics" (ibid).

Other important issues regarding the rehabilitation of Serbia (as a former belligerent state) are the status of minorities and minority rights protection. These matters are outside the control of the ICTY and partly falls outside its impact on the post war societies of former Yugoslavia. This is the responsibility of Serbian authorities and citizens. However, the ICTY's court decisions and its convicting war time criminals could be expected to produce some indirect effects such as setting precedence and guidelines for domestic legal bodies and authorities. In that matter it is important that ICTY decisions take legal precedence over those of domestic courts (Scharf 1997; Schabas 2001:61). Generally it can be inferred that the more war time criminals that are apprehended and convicted, the safer the return of refugees will become (Colvier 2001:27). This is not to equate with reconciliation which by no means follows the return of refugees to their former home towns and villages. But taking away the worst perpetrators is one out of many steps towards reconciliation because reconciliation must be preceded by the will to engage in dialogue, which is blocked by demagogues and extremists enhancing quick or violent solutions to

cultural and social conflicts. But safe return of refugees is a continuing problem both in Serbia, Bosnia and Croatia (Cousens 2001; Weiss Fagen 2003).

Regarding domestic trials over international crimes committed by Serbian citizens, some progress can be traced in the course of the three recent years marking slight progress in the country's legal and political normalisation. It must be stressed, though, that there clearly are more obstacles and more reluctance to make progress than the other way around, especially since the death of Djindjic and also after the formation of a new government under the heading of prime minister Kostunica in June 2004. But the problem lies not solely in the lack of will in governmental branches, that is, lack of political will. There is also a substantial institutional-administrative unwillingness stemming from the significant personal residual from the Milosevic era with a lot of the same persons still in office. "The unwillingness on the part of the police and the army to cooperate in war crimes proceedings is [...] among the many serious obstacles to successful war crimes prosecutions in Serbia." (HRW, 06.04.03).

An indication of a shift in attitudes towards prosecution of war criminals per se is an event occurring in June 2003 where Serbia and Croatia signed an agreement stating that each country should arrest and prosecute its own international criminals. Now, such an agreement might indicate nothing more than a recognition of the mutual wish not to prosecute each others nationals, but obviously this does not necessarily imply any real will to actually initiate serious domestic proceedings against one's own war time criminals. However, a subsequent event suggests an emerging legalistic spirit in the international crimes matters. In October 2003 a new special war crimes court opened in Belgrade. In March 2004 it opened its first trial involving eight accused charged with taking part in the so called "Ovèra massacre" (AI Index: EUR 70/002/2004). It remains to be seen if the trials are concluded in a legally sound and fair manner. The first domestic trial was held as early as 1996 when Dusan Vuèkovic was convicted for war crimes in Bosnia 1992, such as rape of Bosnian Muslim women. Human rights organisations largely consider their trial a

symbolic one and to a significant extent a show trial. Also a partly symbolic trial is that of Ivan Nikolic, a former JNA soldier. On July 8 2002 he was found guilty of homicide, killing two ethnic Albanians in Kosovo on May 24 1999. A more thorough trial involved the case of Nebojsa Ranisavljevic, who was sentenced to 15 years imprisonment by the Bijelo Polje District Court in Montenegro on September 9 2002. He was found guilty of war crimes and having participated in “the hijacking of the Belgrade-Bar train at Strpci in B&H on 27 February 1993, and the abduction and subsequent murder of 20 civilian passengers - 19 Muslims and one ethnic Croat.” (ibid.)

In addition, there have been conducted several prosecutions within the judicial institutions of the military. The Nis Military Court tried and convicted Colonel Zlatan Manièvic, Rade Radojevic and Danilo Tesic for war crimes against Albanians in Kosovo in 1999, and all sentences were confirmed by the Supreme Military Court of Serbia, which even increased the sentences on June 12 2003 (ibid). The Military Prosecutor and the Military Police have over the past two years initiated criminal proceedings against 38 people for committing international crimes in Kosovo, between 1 March and 26 June 1999 (OSCE Report 2003:15). 12 of these cases, involving 21 persons, were transferred to civil courts and are still ongoing (ibid).

Human Rights organisations such as AI and HRW commented extensively on the so called ‘Sjeverin trial’: Bosnian Serb Dragutin Dragicevic and the Serb Dorde Sevic were on 29 September 2003 sentenced to respectively 20 and 15 years for having taken part in the abduction and the subsequent murder of 17 Muslims in October 1992, nearby the town of Sjeverin in Bosnia-Herzegovina. NGOs welcomed the convictions but called for the arrest of Milan Lukic and Oliver Krsmanovic, both of whom were sentenced *in absentia* to 20 years imprisonment for having organised and given orders during the abduction. Earlier that year, on January 22, Serbian media reported that Krsmanovic was living freely and openly in his home in Visegrad in Republika Srpska. The apparent fact that neither local authorities nor SFOR forces had made any attempt what so ever to arrest him, served as an internationally

embarrassing reminder of the all over reluctant attitudes towards furthering international criminal justice in Republika Srpska, a matter highlighted time and again with the public boasting and free roaming of Radko Mladic in the first post Dayton years (Neuffer 2001; Bass 2001; Drakulic 2004).

B&H. Besides ending the war itself and providing some sense of physical security, the Dayton Agreement may actually have created more problems for Bosnia than it solved, thus proving counterproductive. Cousens (2001:128-9) points to four main problems with the agreement: first, “[i]t offered no strategy for implementing its own numerous provisions”; second, it did not provide for or initiate the establishment of a “mechanism for dealing with continued conflict between the Bosniak and Croat communities”; third, the agreement provided no guidelines for setting priorities among all its provision, for example it had no saying about the relative importance of elections but it all the same laid down tremendously ambitious schedule for arranging elections which resulted in favouring the nationalists; fourth, the agreement established no mechanism or even “guidance on how to deal with its chief contradiction: namely, between integration and de facto partition”. These shortcomings, Cousens (ibid.) concludes, did not make the agreement flawed all together as some critics have maintained, it only made it predictable. In that respect, the international actors bearing responsibility for the implementation could and should have done better on several points.

In the first post Dayton years there were made several reports on continued incidents of ethnic cleansing, albeit not any more by means of outright warfare. Early 1996 saw the exodus of almost 60.000 Serbs in different parts of Bosnia (AI Index: EUR 63/001/1997), almost 100.000 Serbs fled from their homes during 1996 “as a result of the transfer of authority away from Pale” (Crampton 2002:286), Croats in Bosniak governed Bugojno were evicted in July 1996 (Cousens 2001:134), and the return of some thousand Muslims to their homes across the inter-ethnic boundary line “had to abandoned because of the worst outbreak of Muslim-Serb violence since the end of the war” (Crampton 2002:286).

Another failure of the Dayton agreement was its overt focusing on inter entity security and order, neglecting local and municipal security problems. This has had grave bearings on the prospects of safe return for refugees, especially those belonging to an ethnic minority and security problems and continued discrimination are usually the greatest obstacles to refugee return. In its World Report 2004, HRW states that as of late 2003, most minority members were in fact still displaced. By the end of war and signing of the Dayton accord some 1.2 million people had found refuge outside Bosnia and an equal number were internally displaced. From 1996 to 2004 there were 1.202.846 registered returns of persons to their pre war homes in B&H, whereof approximately 239.191 to Republika Srpska. Around 136.000 of 496.000 Bosniaks had returned to Republika Srpska (E/CN.4/2004/NGO/71:2). HRW points out that “[t]he large-scale return of refugee and displaced Bosnian minorities began only in 2000” (World Report 2004, chap.14:2). Interestingly, this “breakthrough also resulted from a series of arrests between 1998 and 2000 of persons indicted [...] by the ICTY.” (ibid.). Most scholars emphasise the importance of war time criminal’s arrest and detention as a necessary precondition for the safe return of refugees, especially ethnic minorities (ibid; Cousens 2001; Colvier 2001; Crampton 2002; Weiss Fagen 2003). It therefore is a most disturbing fact that by late 2003 the authorities in Republika Srpska had not made a single arrest on their own (HRWWorld Report 2004, chap.14:4).

The main obstacles to refugee return, and a cause of the sparse inter-ethnic dialogue and cross cultural reconciliation, is not only the security problems and that nationalists endured in key positions but, equally important, that in the hitherto most of the post Dayton years Bosnia has remained a state deeply divided along ethnic lines. The without doubt most relevant dividing line in Bosnian politics is ethnicity. Until after 2000 Bosnia had three different currencies, three different licence plate systems (Crampton 2002:287), two alphabets, three sets of international telephone exchanges, “increasingly, three languages; and especially disturbing, three school systems (Cousens 2001: 139)” Accordingly, the public sphere and the media situation was also divided into three. A grave consequence of this feature is that the ‘truth’ in

matters such as war crimes arrests, indictments and convictions, refugee problems, political disagreements along ethnic lines, etc, came in three different versions (Kurspahic 2003). In sum it must be concluded that, “[B]osnia-Hercegovina was in effect a partitioned state, and it was more a protectorate of NATO and OSCE than a functioning state. Bosnia was a federation in little but name.” (Crampton 2002:287).

Institutional reform has been slow in Bosnia and most federation institutions have not been functioning effectively. (ICG Balkan Report No.132:15-20). The High Representative (HR) was therefore still of vital importance the governance and administration of the country (ibid.). But regarding domestic trials, the case of B&H is probably the encouraging one among all countries discussed in this thesis. There have been two main bodies collecting evidence, a state commission for war time crimes and the security service of the Ministry of Interior. As early as November 1994 when war still raged, the state commission had gathered evidence for 7.100 cases and incriminated 17.000 suspects (Bass 2000:308). According to HRW, most trials in B&H have been pretty fair and mostly unbiased in spite the constant risk of politicisation and putting aside principles of impartiality (HRW Briefing paper, 01.16.04). At the same time, however, many trials are otherwise flawed: case preparation is poor, indictments are not reviewed resulting in lack of evidence, interstate cooperation not satisfactory, witness protection is flawed and the rules for using evidence from the ICTY and how to handle transferred cases is unclear (ibid). As of summer 2004 a dozen war crimes trials are being held in B&H, one of them the so called Ilijasevic trial, where the accused is a Croat commander in the HVO. He is charged with war crimes against Bosniak civilians in October 1993. By comparison, the first war crimes trial ever held in Republika Srpska began in September 2003.

Croatia. The rise to power of more moderate political forces in the wake of Tudjman’s passing away were mentioned earlier, especially the reconciliatory efforts of Mesic. The first more democratic elections were held only 12 days after Tudjman’s death, on 22 December 1999. Here, the coalition of the Social Democratic Party of Croatia (SPH) and the Croatian Social Liberal Party (HSL) won 47 per cent of the

votes, whereas HDZ received 31 per cent. Subsequently, Ivica Racan, from the SPH was appointed prime minister, leading a government actually comprised of six parties. The election of a new government and a new president both of whom nourished a platform quite different from that of the Tudjman regime eventually marked a turn of the political tide in Croatia which now seemed to be moving towards greater tolerance and more democratic political and social institutions. Crampton notes that “The shift away from nationalism was registered when official support of Croats in Bosnia and Herzegovina ceased.” (Crampton 2002:292).

Other steps in the same direction included cutting off exile Croat’s opportunity to vote in national elections and amending the law on minority representation, now proclaiming that “any minority group that formed 8 per cent of the population was to be guaranteed seats in the parliament” (ibid.). The new government also played a more constructive role in the region “- towards Bosnia, above all” (ICG Balkans Briefing Paper 10.16.01:34). The relations with the ICTY remained strained however. As afore mentioned, elements of the former political elites were still pulling a lot of strings and threatening the stability of the government, “[W]hile opinion poll evidence suggests widespread acceptance that Croats, too, must face justice for war crimes” (ibid). In spite of the more moderate government and president, in November 2000, the Chief Prosecutor of ICTY, Carla Del Ponte, complained about Croatia’s lack of cooperation before the UN SC. Crampton also points out that despite the move away from public and government sponsored nationalism, “[t]he move away from authoritarianism was less obvious” (Crampton 2002:292).

Domestic trials have wielded rather mixed experiences. Up to 1999, surprisingly, there were handed down 554 convictions for war time crimes. The unfortunate aspect of this figure is that most of these involved Serb defendants and were obtained *in absentia* (ibid). Both Serb spokesmen as well as spokesmen of human rights organisations labelled most of these convictions as biased. There are two main reasons for this: first, the judiciary was not yet entirely independent during the years of Tudjman but rather partly politicised and secondly, in combination with the first

reason, Croats were not perceived as criminals because ‘the Homeland War’ was seen as fully legitimate as were the means deployed to achieve victory.

The Gospic case, briefly mentioned above, revealed tremendous unwillingness on part of local authorities to assist the courts in the trial of war time criminals and it displayed several other important problems such the inability and unwillingness to adequately protect key witnesses: before the suspects were finally indicted and arrested the key witness, Milan Levar, a war veteran who had witnessed some of the crimes committed by Croats in Gospic, was killed by a car bomb on 28 August 2000. He had been trying to reach out and tell his story about the war crimes committed by his fellow citizens but was silenced in the end (Drakulic 2004:23-34). However, the “trial of the ‘Gospic group’ was a watermark in [the development of] the Croatian legal system. This is because the five men (Tihomir Oreskovic, Mirko Norac, Stjepan Grandic, Ivica Rozic and Milan Canic) were tried for killing Serbs in the winter of 1991, not at the ICTY, but in the local court in Rijeka.” (ibid:35). Rozic and Canic were acquitted of all accusations, Grandic was sentenced to ten years imprisonment, Noric to twelve and Oreskovic to fifteen years (ibid:45).

The Savic trial highlighted several problems with the legal system in Croatia. On January 21, the Serb woman, Ivanka Savic, was sentenced to four years imprisonment for war crimes allegedly committed in Vukovar 1991, when the town fell into the hands of the Yugoslav National Army. The trial which was conducted in the Vukovar County Court, was characterised by HRW as based on “ethnic bias against the Serb defendant” as well as erroneous application of both Croatian and international criminal law (HRW,07.19.04). Many similar cases have been recorded, most of them eventually displaying yet another problem in the legal system of Croatia: the Supreme Court of Croatia in June 2004 annulled a series of verdicts handed down in local and county courts. The Supreme Court addressed both ethnic bias against Serb defendants and also lenient application of the penal code and sloppy prosecutorial work in trials against Croat nationals accused of, among other things, ethnic cleansing against Serbs during ‘the Homeland War’ (ibid). There is in other words, an

ongoing struggle between on the one hand the government and the extremist opposition forces, and on the other similar discrepancies between the Supreme Court and the lower courts, the latter being more corrupt and less impartial and independent in their ruling.

Nationalists have again gained more votes in elections and the HZD returned to power as a result of the parliamentary elections in late November 2003. However the HZD has embraced somewhat more moderate standpoints, a fact which partly explains their comeback as the largest party in the parliament, Sabre. Its leader, prime minister Ivo Sanader, has promised to facilitate the return of more Serb refugees to their former homes in Croatia, he has repeatedly advocated what seems to be a genuine orientation towards Europe, aspirations for EU membership and has pledged full international cooperation, including with the ICTY (BBC, 07.08.01, 03.15.05). Refugee return has been rather slow in Croatia. During the war in Croatia 1991-95 between 300.000 and 350.000 Serbs left their homes. As of autumn 2004 the Croatian government had registered a total of 127.628 returnees (UNHCR, Countries Operations Plan 2005 - Croatia: 2).

III.IV Deterrence

This is no doubt the most dubious point as it is very difficult to determine whether ICTY's indictments have had any deterring effects on persons involved in committing international crimes during the wars. In most cases indictments, it seems, have had no effects whatsoever during armed conflict. Issuing indictments after peace was brokered is a slightly different matter and here the effects are most likely both greater and easier to detect as well. Prevention through deterrence by means of enforcing ICJ is a long term effect. And by and large it remains to be seen what long term effects of the ad hoc tribunals are. Bass (2000) claims that the existence of the ICTY most likely deterred the Croat Army from committing serious war crimes during the 'Storm', the operation in which it reclaimed control of Krajina. The proposition must be dismissed however. Empirical evidence suggests that the operation was ruthless and carried without regard to civilians, in fact ethnic cleansing

was the aim of the operation. This is the main reason for ICTY indicting Ante Gotovina, the last of the Croat indictees to be arrested and extradited. On March 16 2005 the EU postponed membership talks with Croatia because Gotovina remained at large (AI, 02.16.05; IHT, 04.05.05).

III.V Individual accountability, not collective guilt

Impartiality is an essential core principle of all legal proceedings. A serious problem on the behalf of the ICTY, its perceived legitimacy and thus its moral and political impact on the post war societies is that the tribunal has been largely perceived as being biased for 1) not having convicted any Croats (critics: Serbs in Serbia, Croatia and Republika Srpska), 2) not having indicted and eventually, after issuing several such indictments, not having tried any Muslims (critics: especially Serbs and Croats in B&H), 3) not having indicted and convicted enough Serbs (critics: Muslims and Croats in B&H), 4) having indicted and thus insulted war time heroes (critics: war veterans, nationalists and some segments of public opinion in Croatia), and 5) in a similar vein for being generally anti-Serb (critics: nationalists and frustrated segments of public opinion in Republika Srpska and in Serbia). Interpretations are heavily coloured by ethnic identity. But enforcement of strictly individual criminal accountability demonstrates that there exists no collective guilt, in fact there does not even exist any kind of collective moral attributes. In this respect, ICTs are essential in undermining the core notions of ethnic nationalism.

Objectively measured impartiality is improving and the perception is changing in most countries, although very slowly: presently two Bosnian Muslims officers, ex-general Enver Hadzihanovic and ex-colonel Amir Kubura, stand trial before the ICTY charged with the killing of more than 200 Bosnian Croats and Serbs (BBC, 12.02.03; www.un.org/icty). In 1998 two Bosniak camp commanders were convicted for international crimes against Serbs. Human rights organisations that have raised several critical points about the work of the tribunals have characterised trials as ensuring equality before the law. To date, the ICTY has tried individuals belonging to all sides, that is, all three ethnic groups in the conflict. But the majority of both

indictées and convicts remain Serbs. There are two reasonable explanations for this: 1): Serbs constituted the single largest ethnic groups in the former Yugoslavia; and, 2): Serbs actors such as, especially, Milosevic and Karadzic controlling both the JNA and paramilitary forces, were the initial aggressors in the conflict. It was the Serb side in the war that first revealed a policy of ethnic cleansing.

This is not in any way to deny that both the Croat and the Muslim sides in fact also implemented such policies; to be sure, as both reliable reports and the trials have demonstrated, *all sides* committed international crimes, *all sides* ran detention and concentration camps (Allen 1996). What it means is that, for instance, the eventual Muslim aggression against Serbs in Sarajevo, was provoked by Serbian ethnic cleansing in the first place, just as Serb nationalism awoke Slovenian nationalism and toughened the Croatian national tone of voice. The escalation of the conflict is perhaps best explained through analysis of triadic and dyadic interaction patterns, where each actor mobilised both grievances and fear of the others⁵, provoking reactions (Brubakers 1996:69-75).

III.VI Establishing impartial truth

Most scholars especially emphasise one particular aspect of the function and role of ICTs which is closely linked to and dependent on impartiality: namely reconstructing and telling the truth about what happened during the circumstances which produced or in the shadow of which atrocities were committed. “Truth, after all”, Booth underlines, “is the cornerstone of the rule of law” (Booth 2003:183). Law enforcement and conviction of accused persons in a court of law is essentially based on a certain truth, it is, so to speak, nothing more than a certain, normative application of facts established in the course of legal process. In this respects, Booth raises two points to be kept in mind: first, “that international criminal trials have a commemorative potential; they can build an objective and impartial record of events”

⁵ Regarding the mobilisation of historical grievances there is an astonishing parallel between Serbian nationalism and Hutu Power ideology/nationalism – the iconic portrait of a long suffering nation.

(ibid.). Secondly, “proceedings before [ICTs] have the potential of countering the attribution of collective responsibility for acts committed by individuals.” (ibid: 184) Booth thus accurately links the truth telling aspects with the need for and potential of maintaining impartiality.

This was true of the Nuremberg trials, and it is true of the work of both of the UN established *ad hoc* tribunals. An imperative example of ICTY’s truth telling record is the Tadic case, the first trial of international criminal justice since the Nuremberg trials. At the time it started many comments were made about it being a symbolical trial, even a show trial as Tadic was only “a small fish”, etc. However the case eventually proved enormously important, primarily due to the systematic record it established of the context and circumstances in which the atrocities Tadic was accused of did take place.

Tadic was accused of grave breaches of the Geneva conventions (war crimes) and for having engaged in widespread abuses against non Serbs thus taking part in crimes against humanity. Besides the actual participation of Tadic, his presence at the crime scene and matters other related matters, the judges had to decide on two issues in determining Tadic’ guilt: 1) “was the war in Bosnia an international armed conflict or a civil war“, the former being a prerequisite for breach of the Geneva conventions; 2) “did there exist widespread and systematic abuses against non-Serbs“ (Scharf 1997:208) in the first place at the time and the places where the crimes Tadic was accused of allegedly took place? In order of providing evidence the prosecution had to establish a record of the war, of its key events, its main actors, chains of command, causes of war such as the aggressive nationalism and the propaganda, etc. Tadic was found guilty of grave breaches of the Geneva conventions and having taken part in “abuses against non-Serbs”. By answering yes to the questions stated above, the judges were also consenting to that the prosecution’s presentation of the war was an accurate and truthful one.

The greatest obstacle to ICTs truth telling effects is the media situation in the relevant societies; are there independent media reporting from the Hague in a truthful,

sincere manner? Does the public receive any knowledge of these matters? Do they, through media, know what really happened? The answers are generally not encouraging. The media situation in most ex-Yugoslav countries has not been favourable of ICJ at all. During the communist era media were under state control. In the late 80s early 90s most media continued to be state controlled only the state apparatus was now under command of nationalists who gained control of most though not all media. After the wars the nationalists were still in power and most media still ethnically biased and politically dependent. In Bosnia, media was fragmented along ethnic-political lines, offering three different kinds of truth about the war, the war time crimes and the ones guilty of such crimes. The year 2000 however brought something of a turn of the tide, according to Kurspahic (2003).

IV: Concluding remarks: the overall impact of the ICTY

In determining the relative success or failure of ICTs one has to distinguish between at the one hand, legal and political and military institutions, and cooperation amongst them at the other. ICJ is the sum effect of the more or less coordinated efforts of a conglomerate of international and national institutions; ICTs are only one among several actors trying to enforce ICJ. Therefore, it is vital to distinguish between the success of the ICTY itself, and actions on basis of the legal instruments and political means inherently available to it, and whether the joint efforts of the ICTY, the UN, the SFOR forces, NGOs, and national institutions have brought about positive effects in the field of justice and peace building. In this chapter we have been trying to isolate the effects of the ICTY. But without the assistance and cooperation of a plethora of various institutions the ICTY would have achieved little on its own. This means that its success or failure has depended on its ability to cooperate: 'staying the hand of vengeance' in Bosnia is a result of such joint efforts. This also means that the tribunal is still dependent of state cooperation, which is still not satisfactory on behalf of Croatia, Republika Srpska and Serbia and Montenegro. Only B&H has provided proper assistance. (ICTY, Annual Reports 2002, 2003, 2004).

Despite the initial lack of efficiency, mostly due to lack of financial resources and institutional infancy, the tribunal has eventually had significant legal success as several key persons have been convicted of international crimes and others are standing trial. In the ten years of work the tribunal has slowly improved its operations and gradually achieved more institutional maturity. The few indictees who have not yet stood trial, due to unwillingness to apprehend them, have been politically marginalised, an effect at least partly and indirectly caused by the ICTY's indicting them. This is the most important peace building effects of the tribunal: the delegitimisation of war time leaders as criminals, which has been followed by their political disapproval. By dealing with the war time elites ('spoliers'), the YCTY has addressed some important causes of armed conflict in former Yugoslavia. The tribunal has also 'stayed the hand of vengeance' and paved the way for formal criminal justice as a more feasible way of addressing grievances over group violence and atrocities.

The tribunal has also managed to address some other causes of the conflicts, especially factors causing the escalation into war, by establishing an impartial truth about the wars. Ethnic hatred and stereotypes advocated by nationalists relied untruthful perception about ethnic groups being manufactured by and broadcasted in media controlled by these politicians. In (1) verifying legally solid evidence about the atrocities and the circumstances in which they were committed, and (2) holding individuals accountable for the crimes, the ICTY contributes to (ad 1) the establishment of truthful public memory and awareness of what really happened and (ad 2) undermining the destructive notions of collective guilt. Unfortunately, media in most of the states has not been reporting the facts appearing during trials at the Hague in a satisfactory manner. But the media situation is slowly improving.

Deterrence caused by the ICTY has been marginal. It can hardly be credited for rehabilitation effects save in two respects: first, convicting and thus permanently removing criminal leaders has the effect that criminal networks are torn apart, and secondly, this has in part facilitated the return of refugees. However, the tribunal is,

reasonably speaking, not to blame for the shortcomings of various state building projects. Although the ICTY has made *potentially* significant contributions to the peace building processes in Bosnia and Croatia not all of its effects have, as we have seen, translated into prevention of future violence. The relative absence of violence in post Dayton Bosnia is, by all accounts, most likely the result of heavy international military presence (Ahmed 2005). Whether violent conflict will resume in the years to come remains to be seen. Nevertheless, the ICTY has made numerous experiences and thus possess lessons of vital importance and great use for the ICC, of which the new court must be mindful in its future work. Next chapter contains an analysis, similar to the one in this chapter, of the ICTR's impact in Rwanda.

Chapter VI: Rwanda and the impact of the ICTR

I. An African Holocaust in 100 days

Rwanda, 'the land of the thousand hills' (in Kinyarwanda), is a small country in Central Africa, sharing borders with Burundi, Uganda, the DRC and Tanzania. For decades the country was the most crowded in Africa and one of the most populous in the world.⁶ Since about the 16th century, it has been inhabited by three groups or 'communities': the Hutus count for about 85 percent of the population, the Tutsies about 14 percent and Twa, the oldest residents, the remaining 1 percent. Whether these are ethnic groups, 'races', socio-economic classes or, for instance, political communities, is an ever returning question. Indeed, the answers offered to this question represent the very issue that has been troubling Rwandan politics for three quarters of a century (Eltringham 2004:12-27). Politically impartial, unbiased history writing has been the exception among Rwandan scholars, also many Western academics seem somewhat biased and their interpretations and explanations ridden with some sort of *prejudice* (Pottier 2002; Eltringham 2004:4-5). For the past ten

⁶ With its 26.338 km² in 1994 there were 296 inhabitants per km² as the population counted about 7.8 millions. The topography consisting of hills and swamps and agriculture occupying most of the fertile space Rwanda was overpopulated.

years the greatest controversy subject to biased interpretation is who has committed genocide against whom (Lemarchand 1998:4-5).

In the years leading up to its independence and ever since Rwanda has experienced a protracted conflict between its two main groups, Hutu and Tutsi. Moreover, since 1959 the conflict has repeatedly turned violent and it has become increasingly complex and polarised. In 1994 the conflict took the worst turn imaginable: commencing on April 6, in about 100 days government sponsored, elite lead and pretty well organised Hutu extremists carried out what by all standards constituted *genocide*⁷, resulting in about 800.000 casualties. The victims were the country's Tutsi population and tens of thousands of Hutus. The horrific hostilities were by and large brought to an end only when the RPF succeeded in military defeating the extremist Hutu regime and on July 19 Tutsi forces seized the capital, Kigali.

It is important to note that also after the takeover of official power by the RPF human rights organisations soon started to receive reports on and document RPF conducted killings of Hutus, not only in the DRC but also inside Rwanda. This trend has continued almost up to date. Analysing the causal factors and the social and political preconditions of the 1994 genocide, it is equally important to be aware of the fact that several massacres of Tutsis⁸ took place prior to 1994, not only during the years of civil war. In fact, reviewing the history of independent Rwanda, it seems that political violence has become an institution, meaning that political violence as a means of addressing conflict has indeed not been an anomaly but has prevailed at any critical political juncture (Lemarchand 1998:9-11). By most accounts, the genocide

⁷ The definition offered by Chalk & Jonassohn (1990:16) is illustrative: genocide is a state sponsored and *one sided* mass killing, i.e. the killing of or the organised attempt to kill a group, or parts of a group, on basis of its ethnicity, culture or 'race'.

⁸ According to HRW at least four instances of mass killings of Tutsis occurred during the civil war prior to the 1994 genocide, one in 1991, one in 1992 and two in 1993 (Mamdani 2001: 192).

was neither unprecedented in history nor did it come as a total surprise. Due to this and several other historical facts there were, to put it carefully, a series of early warnings of what quite likely was about to happen (HRW & FIDH 1999:150; Stedman 1997:20-6). Most likely the genocide could have been prevented by the skilful use of international force (*ibid.*).

Reaffirming that the main research question of this thesis is whether the ICTR and the ICTY have contributed to preventing the (re)occurrence of international crimes by contributing to peace building, this chapter examines the role of the ICTR in the justice and reconciliation processes aiming at building a sustainable peace in post-genocide Rwanda. More precisely, this chapter contains a theoretically motivated empirical analysis of some of the legal, political and social effects that the ICTR has produced since its inception and which are to be detected in the Rwandan society since early 1995. This kind of academic effort fully adheres to the intension preceding the establishment of the tribunal (Mafwenga 2001). In its Resolution 955 enacted on November 8 1994, the SC explicitly expressed its belief that the tribunal it was about to establish “[would] contribute to the process of national reconciliation to restoration and maintenance of peace...” and that it would “contribute to ensuring that such violations [of international criminal law] are halted and effectively redressed” (S/Res 955). In essence, this chapter examines whether the tribunal has managed to achieve any of these grand goals.

The main argument of this chapter is that the ICTR has made only modest contributions to the peace building process. At the other hand, perhaps we could not have expected any greater achievements on its part given its working conditions and all the obstacles that have contributed to minimise its impact on post genocide Rwandan society. In accordance with its intensions and mandate the ICTR has indicted and tried only the top persons responsible for the 1994 genocide; the target of ICTR’s efforts has and must have been the Hutu elite. Whether this, in turn, has contributed to the complex processes that potentially might lead to reconciliation, is another and partly different question of such a magnitude and complexity that this

chapter has no ambition as to offer any satisfying answer to it. In respect of contributing to peace building by delivering an impartially established truth, experiences of the ICTR are mixed. At the same time, though, the tribunal has contributed to preventing revenge killings on Hutus and thus managed to ‘stay the hand vengeance’ (Bass 2000).

II. A literary review

The literature commenting on Rwanda, its conflict and the 1994 genocide is vast and has grown proportionately to the increased media and scholarly focus on these issues. That is usually a clear cut pretext for making a critical review of it. This is especially important when it comes to assessing the literature in light and through the spectacles of ICJ. For our purpose three observations must be stated:

1) The nature of the genocide and the conflict between Hutus and Tutsies has been largely misunderstood, mainly due to biased and politicised writing of official history and the reproduction of myths and inaccuracies (Mamdani 2001:19-39). Along with several leading authors (Newbury 1999; Hintjens 1999; Lemarchand 1998; Uvin 1998) Mamdani (2001) suggests we must understand the conflict as a *political* one. This perspective includes understanding Hutu and Tutsi as (partly) separate communities resting on different political, not cultural or marked based and certainly not racial, identities. Hence, the *root causes* of the 1994 genocide are mainly political in nature, not purely ethnical, whereas the causes of the *escalation* of conflict and *outbreak* of war are both political, psychological and socio-economical. In the words of two other leading Rwanda scholars, “The violence that engulfed in Rwanda in 1994 was a political phenomenon which had strong overtones of class conflict as well. Ethnicity served as a language through which these [Hutu extremists’] fears and ambitions were expressed, but it was not ethnicity that “caused” the violence.” (Newbury & Newbury 1999:316).

2) The common misunderstandings in parts of the literature rest on uncritical reading of Rwandan history. The myths about the origins of Hutu and Tutsi,

intellectual remnants from early colonial history and racial anthropology, have in slightly modified versions been largely accepted and reproduced (Prunier 1995:30). One particularly unfortunate example is Stanley Meisler's essay, *Holocaust in Burundi* (1972). Meisler's uncritical use of several myths on Rwandan history is no shocking discovery, the problem is that a major part of his text is uncritically quoted as an important case study in Chalk & Jonassohn's allegedly authoritative work *The History and Sociology of Genocide* (1990:384-93). Following the 1994 genocide, a wide range of academic efforts offered new readings of Rwandan history leading up the calamities and various attempts to explain the genocide were put forth. Hintjens (1999:243-4) points out that this voluminous literature tended to rush into conclusions leaving most explanations rather one eyed, albeit often useful. In conclusion she maintains that one has to consider not only external factors such as regional instability and domestic causes such as ethnic bases (Reyntjens 1995); demographic factors and class conflict (Chrétien 1995); and psychological-cultural features such as social conformism and a culture of obedience (Prunier 1995). The literature had to be supplemented by perspectives that acknowledge the role of the state *and* the mass participation in the 1994 genocide, the roles of a variety of institutions and actors, and that the events in concern were essentially political responses to socio-economical and political crisis.

3) The complex causal nexus between ICTs and politics has been treated in an unsatisfactory way and is by far fully explored hence many interesting and important empirical connections have been overlooked. One reason for this derives perhaps from scholarly isolation and lack of interdisciplinary cooperation in many universities and academic milieus. The objects of study desperately require broadly based, multidisciplinary and encompassing analysis. The literature, however, has been either (a) too theoretical, dominated by international legal scholars analysing the formal *potential* of international humanitarian law (ex: Mafwenga 2001), (b) overtly empirical; this regards a large bulk of the literature that must be characterised as 'high journalism' (ex: Neuffer 2001): it often lacks a theoretical base and is rarely guided by systematic propositions (and rarely deserves being called scientific), in

consequence it may be inconsistent, jumping to hasty conclusions. However, the valuable empirical information provided by such accounts must be acknowledged. The third (c) category is also mainly theoretical and consists of the organisational literature, mainly written by political scientists who often seem to lack understanding of ICJ and ICTs (ex: Widner 2001).

III A brief political history of Rwanda

The two most lethal myths about Rwandan history are that (1) before the age of colonialism Rwanda was a peaceful and harmonious society of farmers (Hutu) and pastoralists (Tutsi) and, alternatively, (2) that Hutu and Tutsi are distinct and cohesive ethnic/racial groups of totally different origins and that these groups have always been defined in opposition to each other, making room for the flawed proposition that the conflict between Hutus and Tutsies arose out of their being Hutus and Tutsies. These two historical readings belong to what Lemarchand (1998:5) refers to as the divergent ‘cognitive maps’ of Hutu and Tutsi. This ‘second myth’ was reiterated and buttressed by international media prior to and during the genocide and this had a devastating effect: “The language used by the press to describe Rwanda reinforced the impression that what was going on there was an inevitable and primitive process that [...] could not be stopped by negotiation or force” (Dowden 2004:288).

III.I Pre colonial origins of conflict

The latter view nurtures the kind of perspectives that depict the 1994 genocide as an inevitable outcome of almost natural ethnic animosities. This is the view of some Hutu intellectuals and its primary function is to explain and even legitimise the 1994 genocide as a sort of natural catastrophe. Although this deterministic stance is implausible, it is rooted in reality: the precolonial history of Rwanda is marked by the gradual establishment of a hierarchic, caste like, social system with Tutsi on top (Maquet 1970:163-72). Tutsi were mainly cattle owners and Hutu mostly traditional farmers and the distinction between the groups mostly occupational; “[t]he barrier between the two was flexible and permeable.” (Corey & Joireman 2004:75). For

centuries they have shared the same language and have always intermarried. And they share the same religion. Also, Hutu were allowed to own cattle and if they did their position in the social system – and their group identity - changed (Mamdani 2001:65).

The Tutsi eventually emerged as an aristocratic ruling class (*mwami*) primarily due to their owning land and a class system emerged. Social oppression was not uncommon within that system but it was not motivated by ethnic or racial identity, as voiced in ‘the second myth’. For centuries Hutu and Tutsi were strictly *economic communities* (Mamdani 2001:51). Besides, as a socio-economically organising principle *clan* was even more important than occupation. Contrary to the teachings of the first myth, it is true, however, that this precolonial social order did lay “the foundations for future discrimination”. (Corey & Joireman 2004:76).

Contrary to the teachings in ‘the second myth’ historical research suggests that ethnicity is never a fixed, essentialist category, even when portrayed as such over time, but changes in the course of history (Mamdani 2001:73). This does not mean that because of its not being primordial ethnicity is a phenomenon totally subject to instrumental rationality and pure social construction. No, “[t]o say that ethnicity is a social construct is not to deny that it can be politically potent, but only to note that the political salience of ethnicity depends upon context” (Newbury & Newbury 1999:316). In a similar line of reasoning Mamdani suggests that the “[o]rigin of the violence is connected to how Hutu and Tutsi were constructed as political identities by the colonial state, Hutu as indigenous, Tutsi as alien.” (Mamdani 2001:34).

III.II Colonialism and its legacy: inventing races and ethnicities

From 1885 Rwanda was of German East Africa (Prunier 1995:22) but after World War I The League of Nations “assigned Rwanda and Burundi to Belgium as a trusteeship territory” (Neuffer 2001:87). By relying on traditional power structures both the Germans and the Belgian colonial lords sanctioned the Tutsi rule. In the years between 1926 and 1936 Belgium implemented a series of colonial reforms,

most importantly creating a dual legal-administrative system based on a distinction between “‘customary law’ and ‘Native authorities’” (Tutsies) on one hand and a common European system of “civic law and authorities” (Mamdani 2001:34) on the other. The administrative reforms were guided by the racial thought so common in Europe at the time. Colonial education and official ideology propagated that the superior Tutsies belonged to the so called ‘Hamittic race’, originally settled in Egypt, originally descending from the Garden of Eden itself (Taylor 1999:99-150). Unlike the alien but royal Tutsi, Hutus were seen as brute natives. Over time, though, all myths of the origins of Tutsi and Hutu have been seriously questioned (Eltringham 2004:12-19).

As a logical consequence of racial ideology, the Belgian colonial authorities institutionalised racial classification by issuing identity cards, creating a system in which even formally and legally race both determined social, economical, legal and political status of colonial citizenry. Mamdani underlines the long term effects, of this policy: “Unlike indirect rule elsewhere [...] the colonial state in Rwanda produced bipolar racial identities and not plural ethnic identities, among the colonized.” (Mamdani 2001:35). Racial identities, like the highly polarised ones that emerged in Rwanda as a result of Belgian colonial policies, provide useful raw material for the project of politicising group identities.

III.III The road to independence and the birth of political violence

The first Hutu rebellion took place as early as 1912 (Neuffer 2001:88) but was easily stalled. The awakening among Hutu intellectuals in the early post World War II years that culminated in the Bahutu Manifesto of 1957 and the following uprising and mobilisation against the colonial rule, and eventually the 1959 Hutu revolution, however, was not. This time the Tutsi chiefs had no colonial backup. Once in power, some Hutu leaders turned their racialised anger on Tutsies. The first mass attack upon Tutsies came in 1959 and more followed, notably in 1963-4 and 1973. Among other things, when the envisioned prosperity of the new republic failed to materialise, frustration was channelled onto the ‘enemy within’, the Tutsi community.

Reasonably, these acts of political mass violence lead to waves of Tutsi mass emigration to the neighbouring countries, mainly Uganda and Tanzania, creating permanent diaspora communities. Tutsies left in three waves, in 1959-1961, 1963-4 and in 1973. It is no coincidence that the Tutsi rebel army, whose military invasion started the civil war, was established in Uganda. The civil war that facilitated the political polarisation in Rwanda and eventually paved the way for the extremist ideological hegemony was a consequence of “the crisis in post colonial citizenship.” (Mamdani 2001:5).

The crisis of the First Republic (1962-1973) also lead to its fall. The birth of the Second Republic came with the takeover of general Juvénal Habyarimana in a bloodless coup in 1973. Some things may have improved under the first decade of his rule, such as the establishment of strict law and order⁹ and the enormous inflow of foreign aid, but by the late 80s and early 90s Rwanda faced severe economic crisis: in 1986 international price on coffee, Rwanda’s main export, dropped dramatically and in 1989 it had been reduced by half. The country was by then so heavily dependant on foreign aid that it was probably unable to feed itself and by the time the civil war started it is estimated that as many as half the population were starving (Neuffer 2001:95). Following the common income reduction and the decline in food production the year 1989 saw the first famine in Rwanda since 1943 (Newbury & Newbury 1999: 300). From 1986 to 1990 average income per capita was reduced by 40 per cent (Neuffer 2001:95). In the early 90s the economic crisis deepened as a result of public policy. The government devaluated the currency by 2/3 as part of structural adjustment program prescribed and supervised by the IMF. As a result, prices on precarious import goods rose excessively. The government also cut “the statutory minimum prices to smallholders on coffee” (Newbury & Newbury 1999:299-300). The economic crisis produced widespread social tensions, massive

⁹ Rwanda was for years known as the “Switzerland of Africa” (Neuffer 2001:94).

unemployment, youths without a future, young men without the economic capacity to marry and it even precipitated the spread of HIV/AIDS through fuelling prostitution.

III.IV Civil war and the deepening of conflict

If the pre colonial history holds the background and the social “raw material” for conflict, and the colonial period the root causes of the ethnicised political conflict between Hutu and Tutsi, the civil war, in addition to the socio-economical upheavals of the late 80s and early 90s, provided the causes to the escalation and deepening of the conflict. The civil war that broke out as a result of the RPF invasion in October 1990 is crucial for several reasons: In general, the civil war changed the perception of and the perceived significance of the ethnic conflict by altering the political situation of the country and its groups, it “profoundly changed all those who took part in it.” (Mamdani 2001:185). The RPF went from a liberational to an occupational force. The Habyarimana regime eventually left its official stance of promoting ethnic reconciliation, and the “middle ground” eroded once more. Facing stark socio-economic upheavals, the government almost at once portrayed the RPF attack as a Tutsi threat and called for national unity. In the course of war the national identity was redefined (Hintjens 1999).

The ruling party, MRND, had for long contained an extremist fraction but Habyarimana and his clique remained a moderating force even after the war broke out. As the war went on and the threat of Tutsi re-takeover of power became elevated to the status of common social reality, the extremists gained ground. After peace talks started, sharing power with the RPF was the single most controversial issue in Rwandan politics. Eventually, “[e]very major political party was divided in two: those supporting power sharing with the RPF, and those opposed to it.” (Mamdani 2001:203) Paradoxically, “the more successful the RPF was on the battlefield” (ibid:190), the more Hutus agreed to the prospect of restoration of Tutsi power.

The extremist faction broke out of MRND and the “genocidal tendency” of the *Hutu power* ideology was given a political and organisational platform with the

establishment of the CDR. In essence, Hutu power was an ideology build on the perception that Tutsi had always and would always want to suppress Hutus. Furthermore, Hutu power viewed Hutu as an ethnic group but the Tutsi as a race and thus alien. Hutu were the only rightful rulers in Rwanda. With the rise of Hutu power Rwanda saw the resurgence of racial thought, paradoxically invoking the colonial legacy (Hintjens 1999:251).

The ideological shift towards the Hutu power version came only after massive and systematic propaganda (Gulseth 2004:1,9): August 7, only four days after the signing of the Arusha Peace Agreement between the regime and RPF, RTLM started to broadcast from Kigali (Mamdani 2001:212). This radio station, which had a profound mass media effect due to the illiteracy of about 60 percent, and the newspaper *Kangura* were the main propaganda instruments of Hutu power. Established in 1990 by Hassan Ngeze, *Kangura* spread ethnic hatred and portrayed Tutsi as alien, unwelcome and unwished for 'race' that along with the opposition was to blame for most of Rwanda's ills. After the signing of the Arusha Agreement both RTLM and *Kangura* spoke of "national betrayal" (ibid:211). Now, the ICTR has acknowledged the importance of this use of mass media in spreading the genocidal ideology.

Mamdani claims that "the genocidal tendency was born out of a crisis in Hutu power" (ibid:215). That crisis became apparent when the Hutu extremist party CDR was effectively excluded from any of the power sharing measures provided for in the Arusha Agreement, and even from the transitional government. Arguably, this was the greatest failure of the peace accord: it created more problems than it solved and especially troubling was the 'spoiler problem' it gave rise to (Stedman 1997:5). The propaganda intensified after the signing of the agreement and the organising of the planned Hutu power take over of a series of central institutions was speeded up.

The agreement created yet another strong spoiler effect by stipulating "that, in the new army, elements of the RPA would fill fifty percent of the officer corps and forty percent of the rank-and-file positions - in an integrated army of about twenty

thousand.” (Newbury & Newbury 1999:308). In addition to promising the RPF to hold five out of twenty ministries and eleven out of seventy parliamentary seats in the transitional parliament, the hardline version of Hutu power claiming that the agreement gave far too much to the RPF, became the commonly preferred version. It is against such a background that Hintjens claims that “the genocidal project was a reaction to a deep-rooted crisis of state legitimacy in Rwanda” (Hintjens 1999:251) and that the “hard core within the regime, concentrated in the army” and government structures, that prepared for, planned and organised the genocide, did so not only by virtue of its racial beliefs but because it “feared for its own survival under any power-sharing arrangement with the RPF” (ibid.).

The RPF invasion and the ensuing war also gave rise to “a militarisation of Rwanda state expenditure” (ibid:257), the size of the national army grew rapidly from 1990 and in 1994 its troops counted over 30.000, an increase of more than 300 per cent. Following the changes brought about by war, there was also a “rapid paramilitarisation of Rwandan society, with the creation of hundreds of civil defence associations and covert death squads, all dedicated to fighting the RPF and ‘their allies’...” (ibid.). Consequently, the political parties created their own youth wings - in reality youth militias. MRND had the *Interahmwe* (‘those who work/attack together’) and imitating the ruling party, the CDR set up its own youth militia, *Impuzamugambi* (‘those who have the same goal’). In the course of the civil war, the extremists also gained control of the *Interahmwe*. These militias played a vital part in the genocide and functioned as local mobilising units throughout the country.

The definite “shift of focus from an armed target on the battlefield to unarmed defenceless civilians within” (ibid:215) came after two crucial events: on 21 October 1993 the first Hutu president in the history of Burundi was murdered by extremist elements from the country’s Tutsi dominated army. As a result 200.000 Hutus fled the country and took refuge in Rwanda; many of these refugees proved bitter and politically disillusioned about the events and many of them later took an active part in the genocide. Inside Rwanda hardliners once more benefited from what had happened

and the way it was perceived in Rwandan media and public opinion. The common interpretation was that “History had ruled out the political coexistence between Hutu and Tutsi” (Lemarchand 1995:10). The second event to mark the shift was the one that gave the final thrust to the decisive plans of Hutu extremists and thus sparked the genocide: on April 6 president Habyarimana was on his way from Arusha when his plane was shot down. That same day prime minister, Agathe Uwilingiyimana, was brutally murdered.

III.V. The Genocide

Within hours after the assassination of the president the *Presidential Guard* started killing carefully targeted Hutu moderates, many of them holding high positions within the regime. Tens of thousands of moderate Hutus were killed during the genocide (Prunier 1995:261-5). Estimates on the total number who died between April and July 1994 vary between 650.000 and 1 million (ibid; Mamdani 2001:283). The militias and the government forces, FAR, did a lot of the killing. Together with the national police (*gendarmérie*) the militias - youth gangs consuming alcohol and cannabis, primarily armed with machetes (*pangas*) - organised road blocks in every town. Although the genocide was centrally designed and organised it was the participation of hundreds of thousands of ordinary citizens that made it possible. Uvin (1999:265) contends that as a common motivation partly explaining this “perversely popular character” of the genocide was “revenge, set against the backdrop of immunity”. Fear of being killed or stigmatised along with racial prejudices seem to have been the main motives with the thousands of ordinary persons who turned into *génocidaires*, the victims that became killers. The elites were motivated mainly by prejudice and (threatened) political self interests.

The method for targeting the victims was asking for identity cards. But many cards showed “Hutu” even if the person was tall and thin (Eltringham 2004:31). So despite the fact that centuries of intermarriage had blurred traditional physical distinctions between Hutu and Tutsi “the cockroaches” were targeted by use of the conventional physical classification once introduced by the colonial lords: being

Tutsi was an imposed identity (ibid.). Geographical and administrative features of Rwanda help explain the rate of the killing: besides cultivated spots virtually all space was inhabited and when the killings started there were few places to hide; the detailed administrative structures of “the Switzerland of Africa” were utilised to organise the genocide. Many tried to hide inside official buildings such as schools, hospitals and churches. This proved fatal: teachers, doctors and priests notified local militia that slaughtered the trapped people. There were several grotesque examples of massacres inside churches. Besides the perversely popular character of the genocide the fact that “The professions most closely associated with valuing life – doctors, nurses, priests and teachers, human rights activists – got embroiled in taking it is probably the most troubling question of the Rwandan genocide” (Mamdani 2001:7). However, it must not be forgotten that many resisted the killings, at least at first, and Hutus saved thousands of Tutsies. In many communes killings started only upon the arrival of outsiders, a militia.

IV. The impact of the ICTR

As stated in chapter II and reiterated in the previous chapter, drawing on Bass (2000), it was asserted that ICTs can contribute to building a sustainable peace by “first, purging threatening enemy leaders; second, deterring war criminals; third, rehabilitating former enemy countries; fourth, placing the blame for atrocities on individuals rather than on whole ethnic groups; and, fifth, establishing the truth about wartime atrocities” (Bass 2000:206-7) and by ‘staying the hand of vengeance’. Empirically examining the actual effects of the ICTY in Rwanda since 1994 in order to understand how they have affected peace building is by far any straight forward matter. First, the question of deterrence of *génocidaires* is irrelevant because the tribunal was established *after* the genocide ended. Secondly, in order to appreciate empirical findings we must do our utmost to understand the context. Describing Rwanda from 1994 up to the present as a *post war* society is misleading in several ways: first, the RPF government and the RPA have been involved in military actions and outright war on at least two (possibly three; see, HRW Newsletter, 12.04.04;

Economist, 01.10.05) occasions since the 1994 genocide. Both situations have occurred within the borders of the DRC and were partly motivated and driven by regional political factors, which have played a significant role in the evolution and escalation of the conflict in Rwanda (Mamdani 2001; Stedman 1997; Prunier 1995). The pretext for the RPF invasions in Zaire/DRC in 1996 and 1998 was dealing with the remnants of Hutu militia residing in and organising anew inside refugee camps. Rwanda thus contributed to starting a war in Zaire/DRC that dramatically increased the lasting instability in the whole Great Lakes region. The involvement in it consequently meant that great resources, which could and should have been distributed within Rwanda and its many development projects, were instead being channelled into the military structures and destructive patterns of action (Weiss Fagen 2003:210).

Secondly, hostilities also occurred inside Rwanda in 1994, 1995, 1996 and 1997: remnants of Hutu extremists, organised as guerrillas, repeatedly came across the border from the DRC and terrorised several villages, threatening or killing survivors and potential witnesses (HRW & FIDH 1997). Reportedly the RPA also killed thousands of unarmed citizens, notably in August 1997 (ibid). All such events have bearings upon society, even government sponsored and initiated war in neighbouring countries affects domestic politics, at least economically and indirectly through a more general militarisation of society. Further, the RPF involvement in the DRC is yet another symptom of RPF ideology, as is the enforced reconciliation process, the paternalistic attempts at governing of civil society (Reyntjens 2004:185) and the instrumental utilisation of the 1994 genocide legacy to further its political ends (ibid:208). In all respects, the term post war society seems to be a misnomer in this context.

Third, labelling Rwanda a *post conflict*¹⁰ society would be equally misleading, even a positive falsehood. The political and ethnic conflict between Hutus and

¹⁰ For similar reasons, Ramsbotham (2000:172-3) has suggested the term *post-settlement* situation.

Tutsies lingers on and has even been fuelled by the RPF government and the Kagame regime in recent years. In this context Rwanda must be characterised as a *post genocide* society only. These terms must be taken to denote, qualitatively speaking, partly different social contexts: “Dealing with “post-conflict” situation is one thing; healing the wounds of genocide is a very different matter.” (Lemarchand 1998:5).

IV.I Formal accomplishments of the tribunal

As of January 1 2005 the ICTR has completed 11 cases involving 23 defendants who have received sentences varying from 12 years to life imprisonment. At the same time 9 cases are pending appeal, 25 cases are in progress and 18 detainees are currently awaiting trial. Today 9 accused out of a total number of 78 indictees persons still remain at large, which means that the total number of arrests amounts to 69. The tribunal has acquitted 3 persons (for all statistics, see www.icttr.org).

The case of *Jean-Paul Akayesu* is remarkable for several reasons and requires some comment. Akayesu was the *bourgmestre* (mayor) of Taba Commune when the 1994 genocide started. Initially, he refused to deliver the Tutsies of the commune to *Interahamwe* and withstood the first attempts at massacring Tutsies even by ordering local police to stop the militias. This made him a man of trust and when the genocide spread to Taba at full scale many Tutsies sought refuge in official buildings of Taba. By then, however, the entrusted *bourgmestre* had shifted sides and given in to the militant demands of the *génocidaires* (Neuffer 2001:279). During the genocide thousands of Tutsies and some Hutus vanished from Taba. In the trial against Akayesu the prosecutors build a case “that centered around the betrayal of trust”, demonstrating that he “joined the killing when he realised that his political future depended on it” (ibid). After starting its work the ICTR soon issued an indictment on Akayesu. He was arrested as early as October 10 1995 in Zambia and transferred to Arusha the following year. His trial began on January 9 1997 and ended almost 20 months later when he was sentenced to life imprisonment on October 2 1998.

This was the first case of the ICTR and it will remain one of its most important too. Neither was Akayesu a machete swinging killer, nor was he one of the national level planners and instigators. Nevertheless, he played the same important role in the unfolding of the genocide as did so many other mid and lower level officials. His role proved crucial because he was “a man who, because of Rwanda’s rigidly hierarchical society, had absolute sway over Taba.” (ibid.). Akayesu was, in fact, the first defendant in history to become convicted for the crime of *genocide* as defined in the UN Genocide Convention (Booth 2003:167). Moreover, his sentencing judgement was “the first judgement in which an accused has been found guilty of genocide for crimes which expressly included sexual violence, and the first time an accused has been found guilty of rape as a crime against humanity.” (ibid.).

Akayesu’s initial indictment did not contain any charge of sexual violence and rape. During the cross-examination of a female witness against Akayesu it soon became evident that rape had been used as a means of genocidal warfare against the Tutsies in Taba. The indictment was amended. Acting upon this new type of evidence “Judge Pillay pursued a delicate line of inquire with two women - called by the Prosecutor to testify to other crimes - as to whether rape had occurred in the Commune.” (ibid:168-9). This development is important for at least two reasons: first, it teaches us the importance of female presence amongst the judges in such a tribunal (ibid:171). Now, art.36 of the Rome Statute explicitly calls for female judges. Second, convicting an entrusted, officially employed person like Akayesu adds greatly to the perceived legitimacy and effectiveness of the tribunal. The UN Special Rapporteur to Rwanda, René Degni-Segui, estimated in his report that at least 250.000 women had been raped during the genocide and indicated that the actual figure probably was much higher (SC Report 01.29.96). In other words, as in Bosnia, rape was a central feature of the 1994 genocide in Rwanda, and consequently the ICTR would have to address that problem were ICTs to ensnare any credibility at all.

The case of *Jean Kambanda* is also of both interest and great historical value: he was the first former prime minister ever to be convicted by an ICT for having

participated in and committed genocide. He pleaded guilty and was sentenced to life imprisonment on September 4 1998. The ongoing trial of colonel *Théoneste Bagosora* is of equal if not greater significance, at least when it comes to addressing the active causal factors of the genocide. Bagosora played a particularly active role by being the one who summoned and organised the genocidal government after the assassination of Habyarimana. He stands trial along with three other accused in the joint trial, 'Military I', that began in April 2002 (www.icttr.org)

The 'Media case' also deserves some attention drawn to it. On December 3 2003, judgment and sentence was handed down against three defendants: Ferdinand Nahimana, the founder and principal ideologist of the RTLM, Hassan Ngeze, founder, owner and editor in chief of the Kangura, and Jean-Bosco Baryagwiza, the Hutu Power lawyer who also was an RTLM executive, one of the leaders in CDR and thus an important link between the central political party and propaganda instruments of the genocidal wing of Hutu Power. Nahimana and Ngeze were both sentenced to life imprisonment, as Baryagwiza's sentence was reduced from life to 35 years in prison due to "violations of his procedural rights" (MacKinnon 2004:325). The judgment underlined that "RTLM broadcasts exploited the fear of armed attack to mobilize the population, whipping them into a frenzy of fear, hatred, and violence against the Tutsi and the Hutu supporters..." and that the "RTLM broadcasts stereotyped Tutsi as such as enemy [...] and called on listeners to attack them" (ibid:326). Regarding the role of Kangura the judgement listed several examples of a direct causal nexus between articles in the news paper and genocidal killings. MacKinnon summarises that: "[w]hen people were criticized in Kangura, the Tribunal observed, they would often lose their lives or their jobs" (ibid.).

IV.II Purging threatening leaders – addressing the role of the elites

As we have seen, the elites have at various stages played vital parts in the history of conflict between Hutu and Tutsi in Rwanda. Their behaviour must thus be treated as a major factor in the causal nexus behind both the "invention" of the *political* conflict (out of the pre colonial social "raw material") and more obviously the deepening and

escalation of it. (The outbreak of war was directly initiated by the Tutsi elite in Uganda.) The genocide, as may be seen from most trials in Arusha, was planned, organised and instigated by the Hutu extremist elite.

The work of the ICTR has profoundly evidenced these observations and its practical work has established them as historical facts. In this respect, it has proved overtly important that the tribunal has managed to not only indict by also try and sentence the hard core of the genocidal elite - thanks to a growing will of other states to apprehend and extradite suspects. The list of indictments is something close to a 'who was who' in the genocidal regime of 1994. For instance, most members of the provisional genocidal government are in detention in Arusha and some of them are already convicted. Those that remain at large are largely internationally discredited and effectively prevented from once again aspiring to power.

The main reason for the genocidal Hutu elite being so effectively purged and prevented from power in Rwanda is of course the abrupt regime change that came with RPF military defeating the genocidal regime. However, nearly all of the top figures responsible for the genocide managed to flee the country before being captured. Quite many slipped though the safe zone created by France in 'Operation Turquoise'. Some left the continent but many hid in neighbouring countries. Despite the fact that it is the RPF regime that has prevented the ICTR indictees from carrying out further genocidal acts, their being international pariahs is no doubt a result of the indictments issued by the ICTR. In fact, *all* of the detainees in Arusha were apprehended *outside* Rwanda and transferred to Arusha. This demonstrates the international political will, which grew only slowly, to condemn and prosecute the Rwandan *génocidaires*. It must be concluded therefore that the tribunal has been successful in undermining the influence of the elite responsible for planning and orchestrating the 1994 genocide in Rwanda.

IV.III Some popular perceptions of 'Arusha justice'

If the ICTR is to produce any positive peace building and reconciliatory effects upon the communities in Rwanda, damaged by the genocide, it is absolutely imperative how its formal judicial results are perceived, interpreted, talked about and acted upon. Do victims and their relatives reckon that justice is being done? Do ‘ordinary people’ acknowledge the hard achieved accomplishments of the “Arusha tribunal”?

An enduring problem is the limited media access of ordinary people: due to the illiteracy rate of about 30 percent (CIA, 2004), lack of electricity in rural Rwanda where 90 percent of the population resides and lack standard Western consumer goods like TV due to high costs and poverty, radio remains the only real mass media in Rwanda, a condition carefully utilised by Hutu power through RTLM (Samset & Dalby 2003:29-30). It is estimated that about one out every tenth Rwandan owns a radio. There have been regularly broadcasts from the ICTR trials in Kinyarwanda. But the frequent use of technical, judicial terms and plain summary from the overtly complex cases seems to have rendered the broadcasts meaningless to ordinary people (Neuffer 2001:376).

Even more importantly, the media situation is severely hampered by political subjugation: “[t]here are not yet any private radio channels” in Rwanda (Samset & Dalby 2003:30), a situation that renders the existing ones subject to manipulation by the increasingly autocratic and repressive RPF regime (Reyntjens 2004). It is mostly citizens living inside the capital Kigali who enjoy access to private media, that is, foreign news papers and TV and radio channels like the BBC, the *Radio France Internationale* or stations in neighbouring countries (Samset & Dalby 2003:30-1).

According to Neuffer (2001) the rape victims of Taba, who appeared as witnesses in the Akayesu trial, revealed in interviews that testifying before the tribunal in Arusha in fact “[h]ad been cathartic” and that “The guilty verdict against Akayesu was confirmation of their suffering” (Neuffer 2001:382). However, the same witnesses also were sceptic of the physical (and cultural) distance between the trial and the accused and the victims and the community affected by the defendants’ crimes. The problem, to their minds, was that the responsible ones had the luxury of

not having to confront the victims face to face when admitting to their guilt or being found guilty. Discussing the trial of Kambanda, they believed that this was particularly problematic in “a culture where reconciliation begins with a formal admission of one’s wrongs...” (ibid:377). An additional problem was that the protection offered to the ICTR witnesses was not adequate at first and several accounts exist of witnesses being threatened and even exterminated (Neuffer 2001; Schabas 2001). Over the years witness protection has improved, though.

Extensive interviews also reveal that justice is often seen as *retributive justice*: “For many, [...] trials represent the only opportunity they have to see the memory of their loved ones honoured and those who took their lives away pay the price”, wrote the reporter Marcellin Gasana on April 1 2004 in one of several articles covering popular experiences made in the past ten years (www.internews.org). She also pointed out what seems to be a common feature and popular view in post genocide Rwanda, namely that “[t]he gap between the court [ICTR] and the Rwandan people still remains. Most Rwandans have a problem relating to the work done there.”(ibid).

IV.IV Individual accountability, not collective guilt?

The jurisdiction of the ICTR reads that the tribunal is only allowed to indict and try Rwandan citizens for crimes that occurred in Rwanda and neighbouring states between January 1 and December 31 1994. This has been interpreted as a severe limitation upon the tribunal’s jurisdiction and a liability to its work. The initiative to establish an ICT in 1994 came from the new Tutsi government, at the time a member of the SC. The transitional government supported an international tribunal for four reasons (Akhavan 1996:504-5) which were voiced in the deliberations leading to Resolution 955. However, Rwanda eventually voted against the resolution, delivering seven arguments in support of their own proposal. The first of its arguments was based on dissatisfaction with the temporal jurisdiction of the ICTR. Rwanda raised the concern that it was far too narrow to capture what the SC itself referred to as “the planning stage of the crimes” (ibid:506) in the three years prior to the 1994 genocide.

After nine years of ICTR activity its jurisdiction appears too narrow for another reason which may be undermining its (perceived) impartiality: because it does not cover atrocities occurring *later* than 31 December 1994 it fails to address many grave human rights violations for which RPF officials and RPA soldiers are responsible. This asymmetric way of addressing the conflict and the international crimes is largely perceived as a biased behaviour in breach of the impartiality norms which lie at the core of ICJ. And the image is buttressed and magnified by the ongoing ‘Tutsification’ of political structures in Rwanda. Many Hutus view the work of the tribunal as biased due to the simple fact that it has not yet indicted and prosecuted any single Tutsi, despite that this was recommended in SC Resolution 955 (HRW,08.07.03) drawing on the report of the UN Commission of Experts, which concluded that RPF/RPA had “perpetrated serious breaches of international humanitarian law.”(ibid; HRW, 08.12.02). The main factor blocking the tribunal from issuing effective indictments of any RPF/RPA officials is the Rwandan government.

Whether or not the tribunal manages to maintain legal, objectivistic impartiality is really not that relevant when we are examining its impact on the post genocide Rwanda and its long term peace building. What matters more is how its decisions are perceived by Rwandans, the parties in the conflict. The lessons from the past years are not too encouraging because the impartially established facts about the genocide, and the judicial decisions that are based on it, are often distorted in Rwandan opinion and interpreted in terms unfavourable to ICTR. It seems that truth and history still tend to come in two versions in Rwanda, one Tutsi and one Hutu (Mamdani 2001:267).

Freedom of speech and assembly, guaranteed by the new constitution (Samset & Dalby 2003), are heavily restricted in present Rwanda. And increasingly, for the past three years truth has been becoming rather one sided, almost like during the late years of Habyarimana, only now with the difference that it is dictated by the RPF regime. All opposition parties, such as MDR are now “legally” purged and most human rights offices have been closed. A parliamentary commission was established in January

2004, mandated to investigate the assassination of three genocide survivors in the district of Gikongoro, C. Rutinduka, E. Ndahima and E. Karangira (AI Newsletter, 07.06.04). The commission concluded that “genocide ideology was widespread” and that a number of measures had to be taken. In its report the commission listed a range of political parties, NGOs and civil society bodies and recommended they be investigated and dissolved if necessary. On June 30 June 2004 the Rwandan parliament accepted and formally adopted the commission’s recommendations. In the course of the second half of 2004 a number of political parties and NGOs were penalised or simply shut down, among them FOR, SDA-IRIBA, Witnesses of the Resurrection and Keeping the Memory of Family. Most recently LIPRODHOR, the only independent human rights organisation maintaining monitors at local level, was forced to close down (AI Newsletter, 01.10.05).

According to Mamdani (2001:266-7) ‘state language’ identifies five social categories in Rwanda, in which the population is officially divided (and these categories are obviously not neutral but ethnically coloured terms): 1) refugees, 2) returnees, 3) victims, 4) survivors and 5) perpetrators. *Returnees* means mostly those exile Tutsies who returned when the RPF seized official power in Rwanda. *Refugees* and *victims* include both Hutu and Tutsi. However, to be a *survivor* is a category reserved for Tutsi and as a mere logical consequence, *perpetrators* refers to Hutu only. “This is because the identification of both survivor and perpetrator is contingent to one’s historical perspective. This is why it is not possible to think of reconciliation between Hutu and Tutsi in Rwanda without a prior reconciliation with history.” (ibid.)

IV.V The main obstacles: the political developments into authoritarianism

One of the main obstacles to the work of ICTR has been the problems of cooperation with Rwandan authorities and the generally strained relationship with the RPF regime in the first years. The government controls the mobility of witness and access to crime sites and has on several occasions, hindered investigation. However, these matters have greatly improved for last years.

The main obstacles in the past three years have been the development of Rwandan politics. Kagame has virtually become a new dictator and the RPF the core of the new one party state (Reytjens 2004). Through its suffocating attacks on civil society and discrimination of Hutus the regime is only contributing to renewed ethnic tensions. The efforts to tackle the legacy of the genocide are seriously flawed and deeply counterproductive. The Kagame government has been and is still trying to bring about an enforced, that is top-down, reconciliation: ethnic hatred and racial propaganda has been banned as the government has formally decided that there exist no ethnic or racial differences in Rwanda, all citizens are *Rwandans* only. At the same time the official social labels of survivors and perpetrators refer, as we saw, solely to Tutsi and Hutu and that is a publicly evident, even state sponsored, truth, which is pulling in opposite direction of the official propaganda and in effect discrediting it.

This trend is an attempt of initiating a kind of nation building, an attempt to create some sort of all encompassing and egalitarian national identity on political grounds, which in itself might have been a legitimate and perhaps prudent end were it not for the circumstances. The problem lies in the fact that the coercive, undemocratic means chosen to achieve this grand vision are not only ill suited but constitute an outright misunderstanding and neglect of the root causes of conflict. Systematic, enduring discrimination of one of Rwanda's main groups is the very source of its problems and will of course not do as means of resolving the conflict. Rather, this kind of systematic, official discrimination is a 'recipe for disaster.'

The root causes of conflict, like systematic ethnic and social discrimination, authoritarianism and political exclusion, and biased and politicised views of history, are allowed to linger on then. The government is implementing some very destructive policies that might eventually spark renewed politically motivated ethnic violence and further acts of genocide. A common lesson of peace research from the last decades is that reconciliation cannot be enforced upon a population or community in a top-down strategy (Lederach 1997). This lesson conveys some truth not only about

international but domestic actors, such as government officials and national political leaders, as well. Authoritarian and paternalistic structures and attempts at controlling, governing and moulding civil society at will is an important cause of conflict and conflict escalation. Paradoxically to the present, it is also a part of the colonial legacy.

V. Rehabilitation – the success and failure of domestic efforts

The greatest obstacle to the activities of ICTs, and a significant source to their many failures, is to be found in the institutional, political and social developments within post war societies themselves. Rwanda is no exception, on the contrary. Even though the RPF regime has improved its relations with the ICTR, its development into an authoritarian regime and its increasingly stereotype ethnic ideology appear to be the main reasons behind the slow pace of reconciliation in Rwanda today and thus the main obstacles to any attempts at serving justice - and the reason why the conflict lingers on. That might make violence a likely course of action in the future. Consequently, we must further analyse the relevant legal-political developments in Rwanda since 1994. First, some points on rehabilitation (point III in the theoretical framework) not further commented in this chapter must be raised in brief:

Successful repatriation of ex-combatants, suspects released after pleading guilty and prisoners released for various reasons (many after attending ‘re-education camps’) are absolutely imperative factors in the peace building processes. The question is how these persons are reintroduced or reintegrated into the community. Repatriation of refugees, restoration of private property, compensation to victims’ families, dealing with the scarcity of land, agricultural and other matters of fundamental economic reforms will also prove crucial issues for the long term cultivation of peace in Rwanda.

V.I National trials

The overwhelming number of *génocidaires* in Rwanda would exhaust the capacity of any given legal system. From the outset the ICTR was meant to try top level suspects only, national courts were to carry the main load. On September 1 1996 the “Organic

Law on the Organization of Prosecution for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1 1990” came into force. By then about 150.000 persons suspected - but not necessarily indicted - of part taking in the 1994 genocide overcrowded already poor prison facilities. In the first post genocide years there was a desperate lack of judicial staff. It is estimated that immediately after the genocide there were only 19 trained lawyers left in the country; clearly, the Tutsi elite and in general all many intellectuals, Hutus alike, were the primary target of the *Interahamwe* and the *Presidential Guard*.

Compared to the ICTR the temporal jurisdiction created by the “Genocide law” of Rwanda is wide enough to enhance an ethnically impartial justice process: it covers all incidents of genocide and crimes against humanity committed in Rwanda and by Rwandans in the neighbouring states since October 1 1990, that is, the date of the first RPF invasion, which marked the start of the civil war. This means that also crimes committed by RPF forces during and in the aftermath of the 1994 genocide and all acts of ethnically motivated mass killings up to date can be prosecuted under the law. It also means that the crucial and long term planning phase of the 1994 genocide is addressed by the law. This is referred to in Category 1 of the law regarding the *génocidaire* elite, i.e. organisers and leaders. This category calls for death penalty, although according to AI, it is being used less frequently. (AI Report 2002:13). Category 2 is directed at “the perpetrators of or accomplices to intentional homicides or serious assault against individuals that led to their death”, category 3 covers persons “guilty of other serious assaults against individuals”, and finally category 4 aims at prosecution of all those guilty of “property crimes” (ibid).

A shortcoming of the “Genocide law”, pointed out and criticised by AI, HRW and ICG, is that although it states the accused’s right to free judicial assistance defendants do not get any legal council at the expense of the state of Rwanda. The government eventually allowed judicial assistance by foreign lawyers and *Advocats sans frontières* have provided many defendants with legal help in addition to training lawyers. Other major judicial weaknesses in the first post genocide years regard lack of adequate

facilities for preparing for defence, lack of “competence, impartiality and independence of government and judicial officials, and the environment within the courtroom”(ibid:14). An additional problem apparently not foreseen by the ICTR is that in many cases the national courts have a jurisdiction concurrent to that of the international tribunal, which means that a conflict has arisen over where an accused were to be prosecuted. The law also created procedures of plea bargaining and offers reduced sentences to defendants that plead guilty. About 2000 detainees did so after Kambanda pleaded guilty in Arusha (Frøyland et al 1998:297). Judges could also reduce the automatic death penalty “under mitigating circumstances.”

As of late 2004 national courts had tried about 10.000 persons under the Genocide law of 1996. Tens of thousands have been released as a result of pleading guilty or after being in prison for a period of time that possibly would exceed the length of an actual prison sentence; the general reason is of course lack of capacity, and this is the immediate background for the *gacaca* trials. It is important to note that “[l]egal experts stress that the Rwandese judiciary, despite its numerous flaws, has not failed.”(AI Report 2002:16) Increasingly, the main problem with Rwandan judiciary is the “Tutsification” of recent years. The independence and impartiality of legal bodies are constantly at risk as it is the fairness of the *gacaca* trials.

V.II *Gacaca* - “justice on the grass”?

Organic law number 40/2000 of 26 January 2001 was the legal foundation for establishing the *gacaca* courts. Meaning “justice on the grass” in Kinyarwanda” *gacaca* are traditional forums where “the Rawandan public tries and judges those who wish to confess or have been accused of genocide crimes.” (Corey & Joireman 2004:81). *Gacaca* is an indigenous mechanism for peaceful conflict resolution and might hold a feasible solution to some of the problems of justice in Rwanda.

The intention behind this broad institutional initiation is creating a mechanism for dealing with the enormous backlog of genocide cases exhausting the capacity of the ordinary legal courts. These “community courts provide an affordable and

participatory environment in which to try [...] the thousands of foot soldiers of the genocide.” (ibid:82). In October 2001, 254.152 persons were elected to serve as judges in the new *gacaca* courts (AI Report 2002:28), a function traditionally filled by a community’s elders. It is expected that a total of 10.662 *gacaca* courts will be established (ibid.). These forums will meet the popular requirements of speeding up the justice process in Rwanda. The question is in which way and at what cost: are the *gacaca* handling cases in a legally, politically and socio-culturally sound manner? Will their methods for handing down judgments contribute to reconciliation and peaceful, sustainable reintegration of *génocidaires* into local communities?

Although officials underline that the *gacaca* courts of today “are not intended to duplicate customary *gacaca* procedures” (ibid:21) it is important to note that they differ substantially from the traditional ones in at least three aspects. In the customary procedures a) participation was voluntary, b) the forums were meant to resolve conflicts within a given community and a local context only, and c) the elders appearing as judges “were given leeway to decide any punishment they wished within certain boundaries” (ibid.) acting in what they believed was the best interest of the community. In the present procedures participation is not a matter the whims or will of the accused but is enforced as a legal alternative to regular imprisonment in an ordinary court trial. Second, contemporary *gacaca* are state created quasi-judicial jurisdictions, dealing “not with local disputes, but with a genocide organized and implemented by state authorities...” (ibid). And third, with basic legal training only, the judges of the present courts can impose regular judicial verdicts upon the defendants, ranging from life imprisonment to release (upon guilty plea) subject to community service duty or economic compensation.

Basically, the problem is that on one hand the *gacaca* are bestowed with ordinary judicial means whereas they, on the other, do not meet all too many legal standards given their quasi-judicial nature. “From a purely legal standpoint, the *gacaca* process is flawed.” (ibid:84). According to AI the procedures fail to meet most standards of fair trial: besides the points already mentioned, no physical evidence is required when

final judgements are handed down, witness testimony suffices. Individuals “who confess waive their right to appeal” (ibid:30). And, the accused has no legal representation “but is afforded the opportunity to speak out in self-defence if he/she so desires.” (ibid:85).

The *gacaca* are given a much wider temporal jurisdiction than that of the ICTR. They preside over crimes committed between 1 October 1990 and 31 December 1994, which means that since they cover the entire civil war period, they should be able to deal also with crimes committed by Tutsi, i.e. RPA soldiers, against Hutu. As we saw, unfortunately the ICTR does not enjoy this opportunity which might have been an opportunity of demonstrating impartiality by addressing crimes committed by both sides in the conflict. However, to maintain full impartiality, these courts should ideally be given jurisdiction also for crimes committed later than 1994. That way they could address more killings on the part of RPA soldiers. It is a paradox that only the ordinary courts, and not the *gacaca* relieving them of thousands of cases, have this opportunity.

Corey & Joireman (2004:86) argue that “this politicized application of justice will ultimately undermine the security of both Hutus and Tutsies within Rwanda”. Accused Hutus are sentenced for ‘crimes of genocide’ whereas Tutsies, rarely appearing before *gacaca* courts, are only sentenced for ‘crimes of war’. In effect the courts fail to acknowledge that both sides in the conflict have committed grave crimes. This trend rests on the unsound project of the government covering up the real conflict, dictating an official version of an ethnically harmonious reality that does not exist, and covering up for the brutal military role played by RPF/RPA in the first post genocide years. As the *gacaca* process moves on, many Hutus are likely to perceive the trials as motivated by a desire for revenge. At worst they will be viewed as a kind of collective, state sponsored vengeance. In other words, the *gacaca* are in impending danger of not resolving but buttressing and deepening the social-political divide and conflict between the Hutu and the Tutsi communities.

VI. Dystopic conclusions

“Ten Years After the Genocide” is the subtitle of a note released by HRW on March 29 2004, titled “Rwanda: Lessons Learned” Here the human rights organisation raises ten crucial lessons¹¹ about measures that must be in place if one aims at preventing such a genocide to happen once again. The ‘lessons learned’ are directed at the international community, in particular the UN (and NATO and the EU) and states like the USA, France and UK, all of whom acted far too reluctantly. In general, all third party actors that might have had an impact on the situation should carefully listen to and acknowledge the value of these lessons. The truth is that the international community as such grossly failed to intervene and break the destructive chain of events that culminated, though not inevitably, with the 1994 genocide in Rwanda (Gulseth 2004:7). Despite the numerous accounts and reports in the months before the genocide, several of them made by UN staff, that militias were being armed, in spite of the knowledge brought forth by numerous NGOs during the years of civil war that ethnic-political mass violence was being used time and again in Rwanda and that mass media repeatedly incited the Hutu majority to “wipe out the ‘cockroaches‘”, the UN did not take any serious steps in order to prevent what more than likely was about to happen. The UNAMIR was a failure but given adequate equipment and means it might have been able to stall parts of the atrocities (Neuffer 2001:117; Dallaire 2003).

Eventually, the UN chose to deal with the genocide in a retrospective manner, by creating the ICTR. It took the tribunal several years and billions of dollars to become

¹¹ (1) stop the genocide before it becomes a genocide; (2) react promptly and firmly to preparations for the mass slaughter; (3) pay close attention to the media in situations of potential ethnic, religious, or racial conflict; (4) be alert to the impact of negative models in nearby regions; (5) obtain accurate information about what is happening on the ground; (6) identify and support opponents of genocide; (7) call the genocide by its rightful name and vigorously condemn it and the genocidal government; (8) impose arms embargo on the genocidal government; (9) press any government seeming to support the genocide to change its policy; (10) be prepared to intervene with armed force.

an efficient, effective instrument of ICJ. In the light of the sparse empirical material analysed in this chapter, the ICTR appears to have produced two main effects, both of which are primarily political in essence: the tribunal has proved successful in holding the Hutu power elite accountable for the planning, instigation and organisation of the 1994 genocide. In this respect the tribunal has, with the assistance of various actors, undermined the legitimacy and political influence of the key *génocidaires*, the core of the aggressor community. Whether this will have any deterring effect upon future *génocidaires* is a question subject to vindication of future evidence.

The ICTR has also managed to ‘stay the hand vengeance’. Both the fear and in part the prejudice that motivated the killers were derivatives of the long standing culture of impunity for crimes politically sanctioned by the regime. The ICTR has helped eradicate this culture of impunity by making judicial retribution a solution more feasible than revenge killing. This is a major precondition to sustainable peace.

We have seen, however, that the impact of this measure is likely to get undermined by the behaviour of the present regime. Its ‘Tutsification’ of political and legal bodies and the systematic discrimination of Hutu rendering national justice processes as ‘victor’s justice’ are, along with the second coming of autocracy, only prolonging the conflict between Tutsi and Hutu. The ICTR can hardly do anything about these challenges, although the tribunal could and should also indict RPF/RPA officials and officers in order to improve its perceived impartiality. Meanwhile, because these identities are upheld as rival political identities the conflict between the two is renewed and buttressed. Thereby the root causes of mass violence in Rwanda are allowed to linger on. These causes are mainly political hence any ICT trying to address them in order to prevent future atrocities must be able to produce political effects. These are the main lessons of the past ten years and the ones we must pay closest attention to in the years to come. But, “[t]he key dilemma” in Rwanda is still “how to build a democracy with a guilty majority alongside [...] a fearful minority in a single political community” (Mamdani 2001:266).

Chapter VII: Lessons about the impact of the *ad hoc* tribunals

This last chapter provides a comparative summary of the experiences of the *ad hoc* tribunals. The analysis is guided by the question: how have they contributed to building a sustainable peace? Section I lines out and explicates the lessons learned by our two ICTs. And section II rounds up the chapter with some concluding remarks.

I. The lessons of the ICTY and the ICTR

Lesson I: Undermining the influence of the old elites. It appears that both tribunals have contributed to undermining the political influence of the old political elites bearing the main responsibility for the commission of grave international crimes in Rwanda and former Yugoslavia. These elites played, as was demonstrated in chapter V and VI, crucial roles in the deepening of the conflicts and they were directly responsible for the outbreak of war in Bosnia and the incitement and commence of the 1994 genocide in Rwanda. This means that they were central causes of conflict escalation and war. Their political influence has been undermined by virtue of international indictments which forced them to cling on to power as long as possible,

as in the case of Milosevic, or to step down from power, as in the case of Karadzic whose indictment eventually lead to his demise as a public figure. Most indictees have become politically unpopular and have lost official power and political influence, and in some cases been ascribed the status of *persona non grata*. However, it is a problem that despite being bereft of political power the popularity of indictees such as Karadzic, Mladic and Seselj did not dwindle at once, not even when their old allies began distancing themselves from them. Karadzic is still a popular character.

Here, tribunals have made slightly different lessons, the one of the ICTR being more optimistic: in Rwanda the influence of the *génocidaires* was undermined by the new regime after RPF had ended the genocide and the civil war. A strong indication of the effect of ICTR's indictments (its legitimacy) is that all of the detainees in Arusha have been apprehended *outside* Rwanda.

In Serbia undermining the influence of the old elites holds the potential of causing an additional effect: the old elites are intimately connected with networks of organised crime. Undermining the influence of politicians from the Milosevic era, including of course Milosevic himself, is in effect pertinent for the ongoing struggle against organised crime; removing especially influential persons can help disentangle and deconstruct criminal networks which have notoriously contributed to upholding the culture of impunity for the old elite and are blocking democratic reforms. The late prime minister, Zoran Djindjic, was at front in this battle, a position that apparently cost him his life. He was also a leading figure in the justice process and a strong advocate for extraditing Serbian indictees to the ICTY.

Prosecuting members of extremist political elites has, in Serbia and Croatia, given rise to another positive development: undermining the influence of the old elite is a way of restructuring the political space in post atrocity societies. When the authoritarian politicians representing the former regimes lose credibility and their perceived legitimacy decreases other and more moderate politicians are given the opportunity of entering the political scene. The emergence of alternative and more democratic political forces and movements former aggressor societies such as Serbia

- having long suffered under the weight of authoritarian political structures, ideologies and leaders - requires a de-legitimisation of the old political elites. The regimes are becoming more and more democratic. This may be result of the political pressure and the strong political-economic incentives provided by the EU and the opportunity of EU membership and US financial pressure (Joseph 2005). When EU postponed membership talks with Croatia because its last ICTY indictee, Ante Gotovina, remains at large, it was viewed as a major crisis (IHT; NZZ; Economist).

However, the lesson is that ICTs should aim directly at the elites, for several reasons, and if successful such efforts are beneficial in several respects. Experience from the work of the ICTY suggests that *ICTs can play an important role in this process*.

Lesson II: Cooperation. Following Lesson I this is also an unmistakable lesson of the tribunals' work: it is, of course, imperative that all states where indictees reside show an unconditional willingness to cooperate, which they are obliged to do according to the SC Resolutions establishing the tribunals. Incentives to cooperate vary a lot and they are generally weak in non democratic regimes and have to come from outside the country in the form of economic rewards (Cotright 1997). Such regimes possess the ability to take unpopular decisions and can at any rate defy the work of ICTs. However, if the indictees are commonly viewed *qua criminals* - due to international indictments and exposure of their past behaviour - such actions may become a liability to the regime. This was the case in Serbia under Milosevic who himself became a liability - to his own regime and the more democratic one, lead by Kostunica, that emerged out of the revolution in the fall of 2000.

Regarding cooperation, the ICTY and the ICTR have experienced, not surprisingly though, that they have had to actively cooperate with a number of different institutions ranging from authorities in the affected states, NGOs such as human rights organisations and humanitarian agencies (both local, national and international), regional organisations (OSCE, EU, AU, etc.), international organisations and institutions (UN, NATO, IMF, etc.). Part of the lesson concerning

cooperation is, in conclusion, that ICTs are not only legal but also *political* bodies, that is, they must engage in international politics in order to achieve their goals. Their actions always produce political consequences. And, precisely because a key to the tribunals' success is found in their engaging in political processes such as, and in particular, peace building they must be aware of this lesson. They must of course not forget that delivering criminal justice, in whatever form feasible or available, is only one out of several components required for the process of building a sustainable peace in post atrocity societies. In addition to security other forms of justice, especially economic justice, are equally important. To state the lesson clearly: ICTs are not only required to cooperate with such actors but *their success is by and large wholly dependent upon the efforts of other actors*. The main explanation for this is the problem of apprehension and the problem of cooperation with regimes controlling evidence and investigation sites.

Lesson III: The major obstacles. Lesson II is connected to yet another lesson already discussed but which must again be spelled out in its own right, namely that *the greatest obstacles to the tribunals' activities have been and still are the regimes in the states in which the crimes were committed and the states in which the suspects are citizens*. This is the major hindrance for effective enforcement of ICTs' jurisdiction. And this is perhaps the main reason for ICTs having to engage in political processes such as actively trying to undermine the power of the old elites, opening the political space for more moderate actors..

Lesson IV: No significant deterrence. The ICTY was established when war was still raging in Bosnia. The ICTR was established after the genocide had been carried out and the genocidal regime ousted from power. As was demonstrated in the previous chapter, however, Rwanda was neither a post conflict nor a post war society by the time the ICTR was established, or in early 1995 when it started issuing indictments. But in spite of some differences in the situation in Rwanda and Bosnia at the time of establishment of the ICTs, in both cases, the initial response to the crisis by the international community was that of pure legalism.

In Bosnia the indictments issued by the ICTY apparently had no effect on the ongoing hostilities whatsoever. As pointed out already, the events in Srebrenica in July 1995 were an unmistakable sign of the total lack of deterrence on part of ICTY's activities. Antonio Cassese, then president of the ICTY, stated the matter clearly when he said: "I was hoping for deterrence but after Srebrenica I realised they didn't care at all about the tribunal. The only impact we could have was to bring them to trial after the fact." (Neuffer 2001:168). And in 1999 the existence of the ICTY did not deter Serbian generals in command of troops in Kosovo, Serbian soldiers or the members of the UCK from committing grave crimes.

The main lesson of this shortcoming of ICTs is that *ICTs cannot stall ongoing atrocities or prevent further bloodshed in an armed conflict by means of deterrence*. Thus, the international community cannot rely on the effects of ICTs for preventing heinous crimes. Nevertheless, prevention is and should still be thought of as an important goal of ICJ. The only realistic route to prevention of international crimes is through *peace building as prevention*: by building a sustainable peace in post atrocity societies, that is, building the capacity for peaceful conflict management, resolution or even transformation, the resumption of violence and new atrocities are prevented.

Lesson V: Reconstruction. National trials in post atrocity societies do not automatically draw on the legal precedence set by the ICTs, in the sense that such trials do not always adhere to international legal standards supposedly bestowed upon them by ICTs when trying their nationals. As we saw in the previous chapter, in Rwanda genocide trials do not adhere to all international standards, for example national courts can impose death sentence. Interestingly, though, even if national courts do not act wholeheartedly on the precedence of ICTs, their effectiveness may in part stem from it: the national courts in Rwanda are applying genocide laws more effectively by drawing on some of the precedence set by the ICTR. And both the relative effectiveness of the drafting and implementation of the domestic genocide laws in Rwanda were obviously facilitated by the standards set by the ICTR. However, "a purely international [criminal] process that largely bypasses the local

population does little to help build local capacity.” (Dickinson 2003:304). In Bosnia national war crimes trials, although too few and infrequent, have been remarkably impartial and ethnically unbiased, leaning on international criminal law applications of the ICTY. Today Bosnia has a specialised chamber for war crimes trials. National trials in Croatia and Serbia were long coloured by ethnic and political bias and did not adhere to international standards. The main reason for this was that the old political elites were still in power; they still had some control with the judiciary and were thus able to prevent prosecution of their criminal allies and friends. As we saw, however, this picture has changed dramatically.

In conclusion, ICTs have to act in a *context sensitive* manner, involving and cooperating as much as possible with domestic actors. Restoration of law and order now has to be achieved by other means than before because fear and intimidation are no longer common mechanisms of social control. Establishing law and order is a part of an overall institutional and state building endeavour.

Lesson VI: Individual accountability. An ambition of ICTs, when addressing international crimes committed during armed conflicts in name of ethnicity or race, is and must be that contributing to undermining notions and ascription of various collective qualities. Enduring public (and official) notions of collective guilt and popular feelings of group grievances were a significant cause of emotional animosity and hostility in both Yugoslavia and Rwanda. The hope has been that by assigning strictly individual accountability for international crimes ICTs may undermine the culture of interpreting everything through the lenses of the group as a collective ethnic or racial entity: the ICTY has eventually managed to indict and prosecute both Serbian, Croatian and Muslim defendants¹², but in Serbia and Republica Srpska this

¹² Regarding the hostilities in Kosovo 1999 the ICTY has indicted four commanding officers of the Serbian forces: Vladimir Lazarevic, Nebojsa Pavkovic, Vlastimir Djordjevic and Sreten Lukic. Two of them, Lazarevic and Pavkovic, are in the custody of the tribunal after extradition from Serbia in February 2005 (see, www.un.org/icty). The tribunal has also indicted Kosovo Albanians. Most prominently former prime minister in Kosovo, Ramush Haradinaj, not only founder of the political party AAK (‘Alliance for the Future of Kosova’) but also a former leading officer of the UCK, has been indicted. Once the rumours of an indictment were out he quickly surrendered to the ICTY. The perceived impartiality of the

has only to the slightest degree changed the popular perceptions of the tribunal. The lesson here, then, also reads that the perceptions of ICTs will not change as long as the old extremist elites still control the media and are forming public opinion.

In Rwanda, many Hutus do not hold a very favourable view of the ICTR because the tribunal has not yet indicted any Tutsi. Obviously the genocide was carried out by Hutus but the problem is that the ICTR is in fact mandated (and obliged) to address *all* grave international crimes committed in Rwanda and the neighbouring states, by Rwandan citizens, throughout the year of 1994. This means that the tribunal possesses the formal means to address crimes committed by RPA soldiers in DRC in late 1994 (especially, in refugee camps). However, the tribunal has not yet managed to seize this opportunity and the time is rapidly running out. The perception of bias is further pounded by unfair national trials and the overall Tutsification induced by the RPF authorities.

The work of ICTR and the ICTY and their history of reception in Rwanda and the former Yugoslav countries have taught us that the most important precondition for undermining notions of collective characteristics is perceived *impartiality*. The affected populations will not acknowledge the notions and norms of individual accountability unless they are able to perceive the work of ICTs as being impartial and ethnically unbiased. And in order of making such an impression ICTs have to indict and prosecute suspects belonging to *all sides* in a given protracted conflict.

Lesson VII: Establishing the truth. This lesson is closely connected to the previous one: the message of the ICTY and ICTR regarding truth about what happened in Rwanda in 1994 and in the wars in the former Yugoslav countries is not really getting through in either case. The facts impartially established by the ICTR and

ICTY concerning the conflict between Serbs and Albanians in Kosovo will depend on the tribunal's prosecuting individuals from both sides.

the ICTY have not been communicated to the communities in Rwanda and former Yugoslavia at the rate and to the extent needed for opinion to convey the message. The main reasons for this are the media situation and conditions of infrastructure (Rwanda and Bosnia), the present regime (Rwanda) or both (Rwanda; Croatia and Serbia until 2000). ICTs must provide a context sensitive media strategy, based on close cooperation with local actors.

Lesson VIII: Special issues: women's issues and sex crimes. In order of tackling the protracted conflicts at hand and in order of - by means of ICJ as peace building - preventing reoccurrence of the international crimes committed during such conflicts, *the nature of the crimes must be taken into account.* The nature of the crimes largely derives from the nature of the conflicts they are a part of. Although it must be made clear that genocide is never any simple function or inevitable outcome of ethnic conflict, the nature of the crimes committed in Rwanda and former Yugoslavia were closely related to the specific character of the conflicts, and especially how they developed. Both conflicts deepened and escalated due to political factors but in both ethnicity as group demarcation and collective identity was made the central conflicting issue and thus politically salient; the goals articulated on the basis of group identity were political goals, achievable by political and military means, the latter becoming an extension of the former (to paraphrase von Clausewitch).

At the time the conflict in Bosnia turned violent and during the course of the civil war in Rwanda the ideology and goal of ethnic cleansing (Bosnia) and genocide (Rwanda) had already been articulated. In both cases the aim of the warfare and the violence was group destruction, humiliation or removal. Rape and sex crimes became frequently deployed means to achieve these ends.

Rape does not only humiliate and traumatise women as individuals but also affects their being a member of a group (Allen 1996): either the reproductive capabilities are directly injured and damaged, or/and their sexual behaviour and self image will be permanently altered; some become almost a-sexual as a result of such traumas. The 1994 genocide in Rwanda and the war in Bosnia brought some

hundreds thousand rapes. Detention and concentration camps in Bosnia brought sexual harassment as an organised instrument of torture and not only were there systematic rapes of women. Men were also targeted as sexual beings and five of the judgments before the ICTY acknowledge and address this fact (Askin 1999:51).

The *ad hoc* tribunals have paid special attention to these matters and in consequence “International criminal law has made greater progress on women’s issues since 1993 than during any other time in recorded history” (Askin 2000:47). Almost as much as half of the indictments issued by the ICTY have “brought charges for sex crimes” (op.cit:49). The need to pay special attention to women’s issues and sex crimes is recognised in the Statute which grants the court historical provisions in these matters. In fact the articles 7, 8, 36, 43, 54 and 68 call for special measures in relation to sex crimes (op.cit:58-63). By virtue of the precedence set by the *ad hoc* tribunals and their procedural experiences, particularly in the Akayesu case, the Statute recognises the need for female representation among the judges. Art. 36 demands a “fair representation of female and male judges”. Requirements of special preparedness in cases of sexual crimes are also found in art. 43: the *Victims and Witness Unit* shall be staffed, also, with experts in “trauma related crimes of sexual violence“. And article 68 requires that special measures be taken to “protect the dignity and privacy of victims of sex crimes” (op.cit:63).

The general lesson is to firmly address crimes that reveal the specific nature of the conflict at hand – in order to address its causes and enhance peace.

Lesson IX: Stay the hand vengeance. Both tribunals have managed to prevent revenge killings but in Bosnia this is more likely the result of heavy international military presence. However, if staying the hand vengeance means preventing all sorts of revenge that might add to and therefore counterproductively buttress group grievances, neither tribunal has been quite successful. The ICTR has been less successful than ICTY in this matter: it has not indicted any Tutsies whereas ICTY has both indicted, prosecuted and sentences individuals belonging to all sides in the conflict. However, this precedence has not been adequately assessed by the national

courts in Croatia, Serbia and Republica Srpska. The fact is that national trials have been largely biased and in breach of standards of impartiality; they have thus been viewed as state sponsored legal vengeance of one group on the part of the other (ones). This is also the case in Rwanda, both with regard to the national genocide trials and the *gacaca* processes. But, we must not disguise the fact that the desire for revenge has been transferred onto the legal institutions. Consequently it is fulfilled by non violent means. In this respect, the tribunals can look back on their most significant peace building effect: they *have* contributed to enhancing criminal justice as a peaceful means of conflict mediation and management. The experiences of the tribunals diverge on this point, but the general lesson is that adequate enforcement of ICJ can contribute to peace building by preventing extrajudicial vengeance that might spark violence anew.

II. Concluding remarks

The egregious atrocities dealt with by ICTs are committed as a part of deliberate violent strategies to deal with the countries' long standing protracted conflicts and these deadly strategies were instigated and advocated by the political elites of non-democratic regimes. Therefore, the *ad hoc* tribunals have prudently targeted the elites that are slowly being prosecuted. Their influence, a cause of conflict escalation, is now marginalised. Two beneficial effects of this is the break up of criminal networks hindering democratisation, and opening of political space to more moderate actors. Both tribunals have, largely, "stayed the hand vengeance" and made criminal prosecution more feasible as non-violent means of addressing conflict. They have both addressed the nature of the conflict by including sex crimes in the indictments and by establishing a truthful, unbiased record of the armed conflicts. These effects are all *contributions to peace building in the sense that they undermine some central causes of conflict and war*. However, if peace is understood as altered social relations between adversaries in the conflict the tribunals have not succeeded

Epilogue

Finally, we shall briefly assess the lessons made by the ICTY and the ICTR for the purpose of commenting on the potential merits and limits of the ICC in one of its two ongoing cases, Uganda. Unfortunately, the space does not allow us to elaborate on both Uganda and the DRC. The main reason for picking Uganda is that from both a political, military as well as a socio-cultural point of view the conflict in the DRC appears more complex than the one in northern Uganda. This is of course not to say that the conflict in northern Uganda is a simple one. Based on the analysis of the *ad hoc* tribunal's experiences, how can the ICC possibly contribute to build a sustainable peace in Northern Uganda?

The history of independent Uganda is one of violent political conflict in a country marked by stark ethnic and political pluralism (Samwiri-Lunyiigo 1989:24; see also Brett 1995). In 1986 Yoweri Museveni came to power when his NRA conquered Kampala in the chaotic situation that followed when Milton Obote was ousted for the second time in 1985 and civil war resumed (Petersen 2001:3-4). Since the late 80s there has been violent insurgency in the north (ICG, Africa Report No77:i), predominantly in what is labelled Acholiland, and most LRA soldiers are Acholi. Acholis constituted a considerable part of the army before Museveni's takeover but were not integrated into the NRA after 1986: "Disposed Acholi officers started their first armed rebellion" (ibid:4). After two years of rebellion negotiations took place and an agreement was reached in 1988. To ensure the end of the rebellion the NRA undertook some brutal military operations that apparently caused renewed bitterness amongst, particularly, Acholis (ibid.).

In 1988 the LRA made its first appearances and was viewed as a "continuation of the [previous Acholi] insurgencies" (ibid.). The LRA was established by and centres around its still enigmatic leader Joseph Kony, who portrays himself as chosen by God to found a state on the Ten Commandments (HRW 1999:35). The total size of the army is estimated to be about 3000. (ICG, Africa Report No.77:4). It has no permanent base and resides mostly inside Sudan, undertaking short and ferocious operations into Uganda (ibid.). Since the LRA came on the US list of terrorist

organisations the Sudanese government claims not to be shielding it anymore (ibid:7). The target of LRA's operations is mostly civilians and the "attacks [are] designed to traumatise..."(ibid:5). Seemingly, the broader goal is to discredit the army, UPDM, and in effect Museveni's regime for allegedly abandoning the Acholis and for not being able to protect the population. It is estimated that the LRA has abducted as many as 20.000 children and that as much as 85 percent of its force consists of young abductees (HRW 1999:39).

Lesson I: Undermining the influence of the old elites. As with Milosevic in Yugoslavia Museveni has been in power throughout the current conflict and this is indeed a part of the problem. LRA's brutal insurrection is in part a reaction to Museveni's policies and the total political dominance the ruling elite. Acholis disapprove of national politics in Uganda and the exclusive ethnic basis of Museveni's regime but still they do not, generally speaking, sympathise with the cause of the LRA. It must be made clear that there is nothing remotely democratic about LRA.

Analysing Uganda we once again encounter the phenomena of a small political elite that is in every way an integral part of the protracted conflict at hand, which is a political one. One of the main challenges to the court is how to undermine the elites in order of addressing some of the political causes of the conflict. Thus the ICC must indict Museveni himself, along with some of his ministers and main commanding officers. Indicting Museveni would, however, prove a risky endeavour, perhaps entirely impossible and even counterproductive. But at least some of the commanding officers in the national army must be indicted. In late 2004 peace talks actually emerged between LRA and government forces. It has been put to question whether it is prudent to indict LRA commanders as negotiations are finally being held (BBC,16.03.05). Sceptics use the same argument as was raised during the Dayton peace talks: indictees have a strong self interest in prolonging the war in order of hiding out and shielding themselves from being captured (Allen 2005). By indicting only a handful of LRA commanders at the time the ICC might create different

incentives for different LRA commanders. However, this might also nurture rivalry within the organisation and eventually even cause a split.

When it comes to undermining the capacity of the LRA it is of vital importance that the organisation is build up by and around its sole leader, Joseph Kony, who is ascribed a somewhat divine status. The ICG has drawn attention to the important observation that the structure of the LRA appears vulnerable because of its narrow hierarchy. Once a leading figure is removed, leaves or gets killed in combat, the organisation might crumble. At one instance a cell was bereft of its leader (Brigadier Tabuleh) and in consequence in fell apart (ICG, Africa Report No77:8).

Lesson II: Cooperation. Because ICJ requires a range of measures outside the scope of ICTs such tribunals cannot avoid cooperating with a number of various international and national actors. ICC has acknowledged this need. In a press release upon the opening of the ICC's first investigation, Moreno-Ocampo, stated that "The decision to launch an investigation has been taken with the cooperation of the DRC, other governments and international organizations. (The ICC, 06.23.04)" As pointed out, the process preceding the first two cases have been nearly ideal: in both cases, the situation has been referred by the authorities of the state, where the international crimes in question were committed, asking ICC to start an investigation. This is a good reason to expect active cooperation from these states. The question is whether incentives to cooperate are sufficiently strong. Should the Museveni government defy the requests of the ICC there is not much the court can do on its own. However, for one thing, Uganda is a receiver of substantial foreign aid from Western countries such as Norway, the Netherlands and the UK. Possible withdrawal of financial aid provides a considerable economic leverage.

An additional problem of cooperation is the constant possibility of the Museveni regime creating administrative or legal obstacles to the ICC's work. As it is seems this is already happening. A report by Allen (2005) states that the government of Uganda has promised amnesties to all LRA officers who want to surrender, including even Kony himself. The offer is a part of the government's strategic attempts to

improve the climate of peace talks, which were moving at a very slow pace between December 2004 and March 2005. One problem threatening the attempted peace talks is that the official negotiator of the LRA, Sam Kolo, surrendered to government forces, cutting off the only channel to the LRA. His reason for surrender was allegedly that upon his return to Sudan he was ordered killed by Kony. This information has also been cited by papers like *New York Times* (18.02.05), net based news agencies like *Pan African Press* (19.02.05) and *Reuters* (18.02.05) and *the Monitor* in Kampala.

Lesson III: The major obstacles. In addition to the political challenges already mentioned, a major obstacle is crime scene investigation and the apprehension of LRA indictees in an area still ridden by hostilities and pervasive lack of security. Although the states may be willing to apprehend indictees they may still be unable to do so because the organisation(s) who the perpetrators belong to, in this case the LRA, are parties to the violent conflict during which atrocities were committed. A main challenge is therefore to broker a viable peace agreement. As we have seen, this has been almost impossible in Uganda. One likely explanation is that the LRA has had neither any political, negotiable ends nor any political wing raising political claims. In addition there has been a lack of will on part of Museveni and the government to “resort to” non military means to handle the conflict.

Lesson IV: No significant deterrence. In mid February 2005 Sam Kolo, one of the highest ranking commanders in the LRA, was reported to have surrendered to the UPDF (The Monitor, 17.02.05). In 2004 another LRA commander Onen Kamdul surrendered (ibid). Does this mean that the threat of ICC prosecutions has deterred these LRA commanders? Although both Kolo and Kamdul surrendered during the official amnesty period guaranteed by the government the most likely explanation for these surrenders is a desire to escape terror of being a member of the LRA. In Kolo’s case his life was in immediate danger. So, generally these incidents do not appear to be caused by any preventive deterrence of the ICC. On the other hand, in the same period fewer reports have been made about UPDF encroachments of human rights

(such as torture or rape). Drawing on the lessons of the *ad hoc* tribunals the ICC must not rely on the theoretical, unprecedented possibility of deterrence.

Lesson V: Reconstruction. Compared to the *ad hoc* tribunals the ICC will wield few reconstructive effects in Uganda, partly because such efforts are not required due to the fact that in many respects Uganda is a society with functioning institutions and not as materially devastated as were Bosnia or Rwanda. But in spite of the fact that the present armed conflict has been confined to the North it has produced about 1.3 million refugees. Any attempts at peace building must address this humanitarian crisis. What ICC can in Uganda do is first and foremost to set legal precedence with respect to case judgement, institutional models and legal administration.

Lesson VI: Individual accountability. Museveni asked the ICC to investigate crimes committed by the LRA only. In hindsight, Museveni's request was surprisingly naive, because once the court formally decided to launch an investigation into grave international crimes it became obliged to look into *all* such crimes committed in Uganda falling within its jurisdiction. Although the LRA has been branding itself as an agent of particular cruelty in order of demonstrating the army's inability to protect local population, it seems beyond any doubt that government forces have committed international crimes too. Consequently, the ICC will be obliged to indict officials and officers bearing responsibility for atrocities on the part of UPDF forces. Ultimately, even president Museveni may be criminally culpable.

Whether the ICC will indict individuals from both sides in Uganda's conflict will be a major test of its impartiality. In order of addressing the conflict underlying the armed struggle in North Uganda since 1988, addressing 'Acholi grievances' is necessary. But a formal, potential hindrance is the temporal limits upon ICC's jurisdiction: the court cannot investigate crimes committed before its entry into force on July 1 2002. This means that it is allowed to address only a small part of the present conflict in Uganda and the root causes may be out of its reach. The temporal jurisdiction provision might result in the court's trying only one side in the conflict, i.e. LRA members, because the gravest crimes of the past three years have allegedly

been committed by individuals from that party. If this be the result of ICC's activities in Uganda it will seriously damage the court's perceived impartiality and overall legitimacy. In turn this may of course remove perceived incentives of cooperation with the court not only in Uganda but in other cases as well.

Lesson VII: Establishing the truth. As it seems, the temporal restriction on ICC's jurisdiction might prove a serious limitation on the court's peace building potential. In part, though, the truth telling function of court trial might become a kind of counterweight to this shortcoming. And when trials start, establishing impartial truth about the conflict, and its main political actors, will be a main goal of at least the very first case. Such a strategy by the ICC will expose the role of Museveni and his regime because they are an integral part of the conflict, as is the use of political violence. If the ICC is to set any precedence concerning legal means of dealing with conflict exposing the truth about both sides in the conflict can provide both vital material and useful standards for subsequent national trials.

Lesson VIII and IX: sex crimes and prevention of vengeance. As we saw in chapter V, VI and VII, due to the nature of the crimes they are dealing with, stemming from the characteristics of the conflict in question, ICTs must pay attention to some special issues. Sex crimes are means of humiliating treatment on bases of collective characteristics (Shaw 2003:23-6). Perpetration of sex crimes have been reported from northern Uganda. Many of the girls abducted by the LRA have been forced into sexual slavery as LRA commanders' "wives". And rape has been committed as means of terrorising local population (HRW Report 1999). UPDF soldiers have also been accused of both rape and sexually humiliating torture (AI World Reports 2000, 2001, 2002 and 2003). In general, sexual violence appears to be endemic in the conflict and ICC will have to investigate all such allegations in order of addressing it properly. Grievances caused by sexual violence might become a motivation of extrajudicial vengeance and a cause of renewed conflict. Addressing this part of the legacy of protracted conflict is paramount to preventive peace building. Chapter II and VII portrayed 'staying the hand vengeance' as the most

prominent peace building effects of the ICTY and the ICTR. Provided that the court manages to address the underlying conflict and its causes, by criminalising responsible elites' persons, it can enhance criminal justice as a more feasible way of dealing with group grievances in Uganda. Truth telling might also contribute to this process. But in order of preventing revenge killings the court has to overcome the vast challenge of demonstrating impartiality. Notwithstanding all challenges ahead, though, the ICC is working according to the intensions given the fact that it was the states *themselves* who referred the first cases to the court. Risking a premature judgement: as have the *ad hoc* tribunals the ICC, and in effect ICJ, does make a difference.

List of abbreviations

AI	Amnesty International
ASP	Assembly of States Parties
B&H	Bosnia and Herzegovina
DRC	The Democratic Republic of Congo
FAR	Forces Armees Rwandaises
FIDH	International Federation for Human Rights
FT	Financial Times
GA	United Nations General Assembly
HDZ	Croatia's Democratic Union
HRW	Human Rights Watch
HVO	Bosnian Croat Army

ICJ	international criminal justice
ICG	International Crisis Group
ICTs	international criminal tribunals
ICC	International Criminal Court
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
IFOR	Implementation Force
IHT	International Herald Tribune
ILC	International Law Commission
IMT	International Military Tribunal
MDR	Mouvement Démocratique Républicain
MRND	Mouvement Révolutionnaire National pour le Développement
NRA	National Resistance Army
NRM	National Resistance Movement
NZZ	Neue Zürcher Zeitung
OECD	Organisation of Economic Cooperation and Development
OSCE	Organisation of Security and Cooperation in Europe
RPA	Rwanda Patriotic Army
RPF	Rwanda Patriotic Front
RTLM	Radio Télévision Libre des Mille Collines

SC	United Nations Security Council
SDS	Serbian Democratic Party
SFOR	Stabilization Force
The Statute	The Rome Statute of the International Criminal Court
UCK/KLA	Kosovo Liberation Army
UPDM	Uganda People's Defence Movement
UNAMIR	United Nations Assistance Mission to Rwanda
UNS-G	United Nations Secretary-General
UNTAET	United Nations Transition Administration of East Timor

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